



EMORY
LAW

John Felipe Acevedo, PhD, JD
Visiting Associate Professor of Practice
Director LLM & MCL Programs

June 14, 2023

Dear Judge:

I am writing to enthusiastically recommend Katie Heller as your law clerk. My primary interaction with Ms. Heller was as her instructor in Criminal Procedure: Adjudication at Washington and Lee University, School of Law. During Spring Term 2023 I was a visiting faculty member and Washington and Lee Law and I am currently transitioning from Alabama Law to Emory Law. I was also able to engage Ms. Heller in numerous conversations about criminal procedure and the legal profession. In all of our interactions she has proven to be a thoughtful and well-informed interlocutor.

Ms. Heller has proven herself to be a committed, engaged, and bright student. During course discussions she has demonstrated an exceptional ability to grapple with complex issues and theoretical concepts. In particular she proved an ability to apply the rules to specific facts and to think through hypothetical situations. In addition, she is able to engage in abstract policy discussions in a wide range of topics related to the criminal legal system. Most importantly she has a proven ability to apply the complex concepts to the facts at hand in order to articulate clear legal arguments. For these reasons I believe Ms. Heller has the skills necessary to excel as a clerk in your chambers.

During our discussions, she revealed a firm grasp of core legal concepts of criminal procedure and criminal law as well as an ability to think beyond the material presented in class to wider policy implications. Having taught law students at the University of Alabama, University of Southern California Gould School of Law, Chicago-Kent College of Law, as well as the University of LaVerne College of Law, I would place Ms. Heller among the top quarter of students I have taught at these various law schools.

As you can see from Ms. Heller's resume, she is committed not only to academic excellence but to the practice of law. She is not only involved in our German Law Journal and moot court competition, but has sought out opportunities to gain experience in criminal law. From my interactions with and observations of Mr. Heller, she has engaged each of these positions with great enthusiasm and dedication. I believe she will bring this same work ethic to his clerkship and future practice of law.

For these reasons I firmly believe that Ms. Heller will make an excellent clerk and therefore recommend her application without reservation. If you have any further questions or require additional

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information, please contact me either via e-mail at jfacevedo@emory.edu or by phone at my cell phone (773) 330-8201. My apologies for not providing a work phone number, but I have not yet been assigned an office or phone by Emory University.

Best regards,



John F. Acevedo, Ph.D., J.D.
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Kathryn Heller

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This writing sample is an excerpt from an appellate brief I wrote as a participant in the John W. Davis Appellate Advocacy Competition in the Fall of 2022. The brief is on the issue of a First Amendment claim under 42 U.S.C. § 1983 and Qualified Immunity from the assigned position of the petitioner in the matter.

STATEMENT OF JURISDICTION

This action arises under the federal statute 42 U.S.C. § 1983 from an allegation against a police officer for violation of petitioner's First Amendment rights. The United States District Court for the District of Appalachia had original jurisdiction over this civil action pursuant to 28 U.S.C. § 1331. The District Court entered a final order granting the defendants' motion for summary judgement on the basis of qualified immunity. The petitioner filed a timely notice of appeal and the United States Court of Appeals for the Twelfth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291. Following the decision of the Twelfth Circuit, petitioner filed a notice of appeal to the Supreme Court of the United States. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STANDARD OF REVIEW

For a claim under 42 U.S.C. § 1983, the federal right on which the claim for relief is based must be clearly established. *See Davis v. Scherer*, 468 U.S. 183, 197 (1984). Whether a right was clearly established is a question of law, rather than legal facts, and must be resolved de novo on appeal. *Elder v. Holloway*, 510 U.S. 510, 511 (1994). In examining cases where the defense of qualified immunity is raised, the Court looks only to facts which the defendant knew at the time. *See Kingsley v. Hendrickson*, 576 U.S. 389, 399 (2015).

"[I]f defendants continue to urge qualified immunity, the decisive question, ordinarily, is whether the evidence favoring the party seeking relief is legally sufficient to overcome the defense." *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011). In the posture of summary judgement, the Court is required the view the facts "in the light most favorable to the party opposing the [summary judgement] motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

STATEMENT OF THE CASE

Petitioner Alexandra Klein (“Petitioner Klein”) brought an action against Officer Jonathan Shapiro (“Officer Shapiro”) in the District Court for the District of Appalachia for violation of her First Amendment rights pursuant to 42 U.S.C. § 1983, after Officer Shapiro prevented her from filming an arrest during a counter-protest. Officer Shapiro moved for summary judgement on the basis of Qualified Immunity. The District Court granted the defendant’s motion for summary judgement on the basis of Qualified Immunity, erroneously finding that there was no clearly established right to film the police at the time of the incident, and that Officer Shapiro’s actual knowledge of Petitioner Klein’s rights was irrelevant to her legal claim. Petitioner Klein appealed this decision to the United States Court of Appeals for the Twelfth Circuit.

The Court of Appeals for the Twelfth Circuit affirmed the District Court of the District of Appalachia’s ruling and found that Officer Shapiro was entitled to raise the defense of Qualified Immunity, over a sharp dissent from Judge Rogers and a concurrence from Judge Lamzik, questioning the majority’s adherence to the rigid objective test for qualified immunity. The Court held that the right to film police officers was not clearly established at the time of the incident, and that under the objective prong of the *Harlow* test, Officer Shapiro’s actual knowledge of Petitioner Klein’s first amendment rights did not preclude him asserting the defense of Qualified Immunity.

STATEMENT OF THE FACTS

On June 26th, 2016, Petitioner Klein attended a peaceful protest in Lexington, Appalachia. This protest was organized by a local bar, in response to a senseless act of violence targeting the LGBTQ and Latinx population, in a public park that was frequently used for large gatherings.

On the day of the protest, two officers were in attendance performing crowd control. One of those officers, Officer Shapiro, had previously received supplemental training on the First Amendment rights of protestors. That material specifically notes that “members of the public generally have the right to record them while they are on duty.” In addition to this training, Officer Shapiro had obtained a law degree from Wisdom and Liberty School of Law, and had completed at least one course on the First Amendment.

The event started peacefully, but escalated when a group of counter-protestors came to the event. In response, the officers positioned themselves in between the two groups. One of the counter-protestors, Ms. Rebecca Eiffel, became frustrated after a perceived slight from the protestors, and patted her waistband, and told the other side that “[y]ou better be glad you got the blue there, you wouldn’t like it if I came over there.”

Upon hearing this threat, the officers attempted to contain the situation. Ms. Eiffel refused the officer’s request to back up, and began to yell profanities at them. An Officer proceeded to arrest Ms. Eiffel for disorderly conduct. At this time, Petitioner Klein had crossed the street, and was filming the arrest using Facebook Live. Officer Shapiro then requested for her to turn the video off. Petitioner Klein stood her ground and clearly asserted her First Amendment rights, telling Officer Shapiro that she “had the right to do this” to which Officer Shapiro said “yea, yea, I went to law school I know your rights.” Despite this assertion that he understood

Petitioner Klein had the right to film him, Officer Shapiro took control of Petitioner Klein's phone and shut down the livestream.

SUMMARY OF ARGUMENT

The lower court incorrectly ruled in granting Respondent's motion for summary judgement on the basis of qualified immunity, and the decision should be reversed for two reasons.

First, Officer Shapiro cannot raise the defense of Qualified Immunity, because the right to film police was clearly established at the time of violation, and the right to film the police exists as a general constitutional principle under the First Amendment. The right to film police is a clearly established constitutional right, evidenced by the numerous circuits recognizing this right. The majority erroneously relies on the fact that some circuits have not specifically addressed whether there is a clearly established right to film the police. Furthermore, the right to film police is materially obvious from fundamental principles of the First Amendment such that Officer Shapiro was on notice of these rights.

Second, actual knowledge of a constitutional right should preclude Officer Shapiro from asserting the defense of Qualified Immunity. Congress's intent when enacting Section 1983 was to provide a mechanism for individuals to vindicate their constitutional rights when violated. However, the Supreme Court's precedent establishing Qualified Immunity has made it nearly impossible for individuals to seek relief pursuant to Section 1983. In particular, the objective test established in *Harlow* has allowed government officials who intentionally and maliciously violate individual's rights to escape liability. Overruling *Harlow* and reinstating the subjective prong of the Qualified Immunity test established in *Wood* would protect officers who make

reasonable mistakes while also providing a means for individuals who have suffered intentional violations of their rights to seek relief.

Petitioner now appeals to this court, on whether Officer Shapiro should be able to escape liability for violating her First Amendment rights, by claiming that the right to film police officers was not clearly established and that his actual knowledge of her First Amendment rights should not preclude him from asserting the defense.

ARGUMENT

I. OFFICER SHAPIRO IS NOT ENTITLED TO QUALIFIED IMMUNITY.

The doctrine of Qualified Immunity provides a mechanism to protect governmental officials from “harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine ensures that government employees cannot be sued when the law is not clearly established, in order to give them fair notice when their conduct is unlawful. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). In order to determine whether a defendant can raise the defense of Qualified Immunity, *Saucier* established a two-part test, where courts must first determine “whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right:” and second “whether the right was clearly established at the time of the defendant’s alleged violation.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In *Pearson*, the court ruled that lower courts have the discretion to resolve the issue on either prong. *See Pearson*, 555 U.S. at 236. Thus, in order to raise a successful defense of Qualified Immunity, a government official need only prove that a right has not been “clearly established” at the time of its violation. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *Harlow* is the seminal case on Qualified Immunity, in which the Supreme Court held that government officials are immune

from liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.*

In order for a right to be clearly established, the Court does not require that there be a case directly on point. *See White v. Pauly*, 580 U.S. 73, 79 (2017). Rather, “in order for a constitutional right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Id.* at 1004–05. Furthermore, in order for a right to be clearly established, it must have “such a high degree of specificity” that it “clearly prohibits the officer’s conduct in the particular circumstances before him.” *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018). Case precedent must demonstrate that the issue in question is “beyond debate.” *Ashcroft v. Al-Kidd*, 563 U.S. 731, 740–741 (2011). Otherwise, “[p]laintiffs would be able to convert the rule of qualified immunity... into a rule of virtually unqualified liability simply by alleging a violation of extremely abstract rights.” *Id.* at 639.

A. OBSTRUCTION OF KLEIN’S ATTEMPT TO FILM OFFICER SHAPIRO IS A VIOLATION OF THE FIRST AMENDMENT.

1. THERE IS ROBUST CONSENSUS FROM PERSUASIVE AUTHORITIES THAT VINDICATES FILMING POLICE OFFICERS AS A CLEARLY ESTABLISHED FIRST AMENDMENT RIGHT.

The right to film police is clearly established, demonstrated by the “robust consensus of cases of persuasive authority” which affirm that right. *Ashcroft*, 563 U.S. at 741. The Third Circuit Court of Appeals acknowledged that a police officer violated the petitioner’s clearly established First Amendment rights when officers confiscated the petitioner’s phone after he took a picture

of police breaking up a house party. *See Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3rd. Cir. 2017). The First Circuit Court of Appeals in *Glik* recognized that the police violated a clearly established right when they arrested the petitioner for using his cell phone to record the police arresting a young man. *See Glik*, 655 F.3d 78 at 91. Many more courts have recognized that the right to film police is clearly established. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 599–600 (7th Cir. 2012) (holding that a statute that would prohibit recording police officers with a cell phone violated the First Amendment); *see also Gericke v. Begin*, 753 F.3d 1, 7–9 (1st. Cir. 2014) (“the Constitution protects the right of individuals to videotape police officers performing their duties in public”); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (finding that the “First Amendment protects the right to gather information about what public officials do on public property”)

Furthermore, the fact that the Twelfth Circuit has not previously recognized the right does not mean that it was not clearly established when Officer Shapiro shut down Petitioner Klein’s live stream. The court in *Glik* held that although the Fourth Circuit had not previously recognized a right to film the police, the right was clearly established in that jurisdiction at the time of petitioner’s arrest. *See Glik*, 655 F.3d 78 at 84–85. Even without a case on point in the jurisdiction, many other circuits had recognized the right to film government officials, sufficient to establish a robust consensus. *See id.* (finding that the holdings from other circuits “implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment’s protections in this area.”); *see also Turner v. Lieutenant Driver*, 848 F.3d 678, 688–89 (5th. Cir. 2017) (recognizing that a “robust consensus of persuasive authority . . . that defines the contours of the right in question with a high degree of particularity” can establish a defined right.)

**2. EVERY SINGLE CIRCUIT THAT HAS SUBSTANTIVELY ENGAGED
WITH THE MERITS OF THE ISSUE OF FILMING POLICE OFFICERS
HAVE RECOGNIZED IT AS A RIGHT.**

Every single circuit court that has addressed the issue of First Amendment protection for filming the police has concluded that it is a protected right under the First Amendment. However, some circuits have struggled to define when a right is clearly established. In *Gerskovich*, the court held that while the petitioner's activity was clearly protected under the First Amendment, they declined to address whether the right to record police activities was clearly established. *See Gerskovich v. Iocco*, 15 Civ. 7280 (RMB), 2017 WL 3236445, at *6 (S.D.N.Y. 2017). Furthermore, the Second Circuit also had an opportunity to address whether the right to record the police was clearly established, but affirmed the district court's grant of summary judgement without substantively engaging with the question of whether the First Amendment right was clearly established. *See Higginbotham v. Sylvester*, 741 Fed. Appx 28, 30 (2nd Cir. 2018).

Circuit courts have been left to analyze what constitutes a clearly established constitutional right without clear guidance from the Supreme Court. The Fourth Circuit examined a case in which plaintiffs were prevented from filming police activity in public, and granted summary judgement for the defendant, concluding that there was no controlling precedent from the Supreme Court or the Fourth Circuit that would establish a basis for a clearly established right. *See Szymecki v. Houck*, No. 09-1094, 353 Fed.Appx. 852, at *853 (4th Cir. Nov. 24, 2009). However, the court in that instance did not engage with the substantive merits of the First Amendment rights. This circuit represents an outlier among the numerous Courts of Appeals that all confirm that citizens have the First Amendment right to film police officers. Not a single

Court of Appeals that has considered the issue has decided against citizens First Amendment rights to film police officers. This leads to a dilemma in which “[P]laintiffs must produce precedent even as fewer courts are producing [it] because the lower courts are instead simply ruling that rights are not established.” Petition for Writ of Certiorari, Brennan, 141 S. Ct. 108, (No. 18-913) (quoting *Zadeh v. Robinson*, 902 F.3d 483, 499 (5th Cir. 2018)). This means that “important constitutional questions... unanswered precisely because those questions are yet unanswered.” *Zadeh*, 902 F.3d at 499. As an illustration of the practical effect of this problem, the court in *Jessop v. City of Fresno* considered the question of whether officers who had allegedly stolen \$225,000 while performing a search were entitled to Qualified Immunity because the court had “never addressed whether the theft of property covered by the terms of the search warrant, and seized pursuant to that search warrant, violates the Fourth Amendment.” *Jessop v. City of Fresno*, 936 F.3d 937, 941 (9th Cir. 2019). This is despite the fact that “virtually every human society teaches that theft is morally wrong.” *Id.* at 944.

Therefore, the fact that some circuits have reached the conclusion that the right to film police is not ‘clearly established’ should not be persuasive. In consideration of the more than a “handful” of circuits that have come to the conclusion that filming police officers is a clearly established First Amendment right, this court should find that at the time that Petitioner Klein filmed Officer Shapiro, the right was clearly established.

**B. THIS FIRST AMENDMENT VIOLATION IS SO OBVIOUS THAT THERE
NEED NOT BE A MATERIALLY SIMILAR CASE FOR THE RIGHT TO BE
CLEARLY ESTABLISHED.**

1. THE RIGHT TO FILM THE POLICE EXISTS AS A GENERAL CONSTITUTIONAL PRINCIPLE UNDER THE FIRST AMENDMENT.

A right is clearly established when its “contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.” *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018). First, we must look at whether there is a “robust ‘consensus of cases of persuasive authority’” *Ashcroft*, 563 U.S. at 741. Second, we look to see if the constitutional violation at issue is so “obvious that there need not be a materially similar case for the right to be clearly established.” *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004).

There is extensive and pervasive history that demonstrates that because one of the central purposes of the First Amendment to hold the government to account, recording of law enforcement activities is a form of speech which accomplishes that purpose. *See Turner v. Lieutenant Driver*, 848 F.3d 678, 688–89 (5th. Cir. 2017). The court in *Turner* emphasized that “the principles underlying the First Amendment support the particular right to film the police... Filming the police contributes to the public’s ability to hold police accountable, ensure that police officers are not abusing their power and make informed decisions about public policy.” *Id.* at 689. The Court has recognized that there is an interest in giving police officers discretion to safely complete their job responsibilities, but “[s]uch peaceful recording of an arrest in a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.” *Glik*, 655 F.3d at 84. The Court has emphasized that freedom of speech is particularly important when it comes to the government, as there is often greater incentives to suppress information among the populace. *See First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). The Court has also recognized the importance of freedom of speech in

traditional public forums, like parks and public streets. *See Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45 (1983). Furthermore, “photography or videography that has a communicative or expressive purpose enjoys some first amendment protection.” *Kelly v. Borough of Carlisle*, 622 F.3d 248, 260 (3rd Cir. 2010). The availability of new technology has taken on greater First Amendment protection because it gives individuals the power to quickly share information about government abuse of power. *See Gaymon v. Borough of Collingdale*, 150 F. Supp. 3d 457, 468 n.9 (E.D. Pa. 2015) (“Police abuse captured by the cameras of bystanding videographers... has become a regular feature of our public life.”)

The facts of the present case clearly demonstrate a violation of First Amendment rights. Just like the petitioner in *Glik*, Petitioner Klein was filming the police in a public park, a space in which the Court has consistently protected the freedom of speech. *See Perry Educ. Ass’n*, 460 U.S. at 45. Petitioner Klein was using the Facebook Live platform to livestream the arrest, which is a platform like other traditional modes of facilitating speech, allowing her to convey important information about the actions of the police officer. *See Kelly*, 622 F.3d at 260. Further facts in the present case weigh in favor of the exercise of her First Amendment rights. Just as the Petitioner in *Glik*, she was not physically embroiled in the arrest nor was she otherwise interfering with the arrest that would warrant officer safety concerns to justify infringing her rights. Thus, “[b]ecause the First Amendment ensures the existence of ‘critical public discourse’ by protecting ‘the dissemination of information relating to government misconduct,’ Petitioner Klein, like any individual, has a right to show the public how the police act in the course of their duties.” *Klein v. Shapiro*, 46 F.4th 902 (12th Cir. 2022) (quoting Rogers, J., dissenting).

**II. OFFICER SHAPIRO’S ACTUAL KNOWLEDGE OF FIRST
AMENDMENT VIOLATIONS SHOULD PRECLUDE HIS
QUALIFIED IMMUNITY DEFENSE**

**A. THE INTENT BEHIND THE ENACTMENT OF SECTION 1983 HAS
BECOME REMOVED FROM THE COURT’S CURRENT
PRECEDENT WHICH ROUTINELY ALLOWS PUBLIC OFFICIALS
TO AVOID FACING LIABILITY FOR VIOLATIONS OF
CONSTITUTIONAL RIGHTS.**

The Court’s precedent establishing near-impossible standards to bring Section 1983 claims against police officers does not comport with Congress’s intentions when enacting the federal statute. A reversal of the objective standard in *Harlow* is a means in which to ensure that intentional violations of constitutional rights do not go unaddressed. Congress passed 42 U.S.C § 1983 (originally the *Klu Klux Klan act*) in order to protect the rights of newly freed slaves against state officials who deprived them of their constitutional rights. H.R. REP. NO. 96-548, at 1 (1979). This was done in order to vindicate the rights of those individuals against state and local officials who were unwilling to enforce the laws against other state officials who intentionally violated others rights. *See id.* Although no affirmative defenses like Qualified Immunity are within the text of the bill, the Court has created this defense on the basis that immunity to civil suit was “so firmly rooted in the common law and supported by such strong policy that ‘Congress would have specifically provided had it wished to abolish the doctrine.’” *Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

The doctrine of Qualified Immunity has given law enforcement officials “substantial discretion that may be misused to deprive individuals of their liberties.” *Glik*, 655 F.3d at 82. The

doctrine previously did not apply to officers who intentionally violated the law, but since *Harlow*, has expanded only to officials who violate a “clearly established” law. *Harlow*, 457 U.S. at 818. As it currently stands, Qualified Immunity “protects all ‘but the plainly incompetent or those who knowingly violate the law.’” *White v. Pauly*, 137 S.Ct. 548, 551 (2017) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). This creates a system in which individuals who have had their constitutional rights violated have no means of redress. See *Thompson v. Clark*, 2018 WL 3128975, at *11 (E.D.N.Y. June 26, 2018).

**B. THERE SHOULD BE AN ACTUAL KNOWLEDGE EXCEPTION TO
THE OBJECTIVE STANDARD ESTABLISHED IN HARLOW IN
ORDER TO VINDICATE INTENTIONAL VIOLATIONS OF
CONSTITUTIONAL RIGHTS**

Harlow v. Fitzgerald presented a substantial change in the doctrine of Qualified Immunity, eliminating the subjective component of the prior Qualified Immunity test, that took into account the defendant’s perceptions of the legality of their own actions. See *Wood*, 420 U.S. at 322. The court in *Harlow* decided that the subjective prong was no longer necessary, under the reasoning that Section 1983 claims would expose defendants to time-consuming and frivolous litigation aiming to understand the state of their mind. See *Harlow*, 457 U.S. at 816. However, judicial economy cannot be the sole reason for this defense, as truly frivolous litigation would be dispensed with at the summary judgement phase. See *Wyatt v. Cole*, 504 U.S. 158, 171 (“... subsequent clarifications to summary-judgement law have alleviated that problem... Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad-faith can be tested at the summary judgement phase.”)

The intentional violation of Petitioner Klein’s First Amendment rights in this case clearly warrants a remedy. Officer Shapiro had previously received training on the rights of protestors, which included information about the fact that “members of the public generally have the right to record them while they are on duty.” Even further, Officer Shapiro received training that is uncommon among law enforcement, a law degree which expressly included education about the First Amendment. During the incident in question, Petitioner Klein unambiguously asserted her First Amendment rights, saying that she “had the right to do this” to which Officer Shapiro responded saying “I know your rights” and yet intentionally violated them. The present case avoids the concerns the Court discusses in *Harlow*, about time-consuming litigation concerning the officer’s state of mind, because Officer Shapiro made his state of mind readily known. *See Harlow*, 457 U.S. at 816. Reinstating the subjective prong of the *Wood* test would “[supply] the means to address severe cases of malice through an actual knowledge exception recalibrates the qualified immunity analysis to give heavier weight to the protection of the individual harmed without sacrificing the societal need to protect government officials from frivolous suits.” *Klein v. Shapiro*, 46 F.4th 902 (12th Cir. 2022) (Lamzik, J., concurring).

C. THE STANDARDS OF *STARE DECISIS* COUNSEL A REVERSAL OF *HARLOW*

At this time, it is appropriate for the *Harlow* test to be overruled. This is because “Stare Decisis is not an inexorable demand.” *Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct. 2228, 2262 (2022). The Court in *Dobbs* explained that when a prior court reaches the incorrect decision, it may be necessary to “correct our own mistake.” *Id.* Justice Thomas has stated that this Court has “diverged from the historical inquiry” and that the Court “[i]n an

appropriate case, should reconsider [its] qualified immunity jurisprudence.” *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1871 (2017). In the case of *Zadeh*, Judge Willett stated that the current status of Qualified Immunity “let[s] public officials duck consequences for bad behavior- no matter how palpably unreasonable...” *Zadeh v. Robinson*, 902 F.3d 483, 499 (5th Cir. 2018). Similarly, Justice Sotomayor, dissented in *Kisela* over the Court’s decision to grant Qualified Immunity, arguing that the decision would “send an alarming signal to law enforcement officers and the public” because officers would “shoot first and ask questions later, and show the public that palpably unreasonable conduct wouldn’t go unpunished.” *Kisela*, 138 S.Ct. at 1162.

Overruling the objective prong established in that case would vindicate the First Amendment rights of Petitioner Klein, as there is clear evidence in this case that her rights were intentionally violated. Reinstating the subjective prong in her case would provide a remedy for defendants like her to achieve meaningful access to relief when their rights are intentionally violated, while at the same time giving state officials discretion for good-faith mistakes. Thus, overruling *Harlow* and reinstating the two-prong test in *Wood* would serve as an effective remedy against intentional abuses of power.

CONCLUSION

The decision of the Court of Appeals for the Twelfth Circuit should be reversed and the issue remanded to the district court for a determination of Petitioner Klein’s Section 1983 claim.

Respectfully submitted,

Katie Heller

Counsel for Petitioner

Applicant Details

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Applicant Education

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Date of BA/BS	May 2017
JD/LLB From	New York University School of Law
	https://www.law.nyu.edu
Date of JD/LLB	May 22, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	New York University Law Review
Moot Court Experience	Yes
Moot Court Name(s)	Orison S. Marden Moot Court Competition

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

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June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to apply for a clerkship in your chambers for the 2024-25 term. I am a rising third-year student at New York University School of Law. In addition, I am committed to pursuing a legal career in public service.

Enclosed are my resume, transcript, a writing sample, and letters of recommendation. My recommenders are Professors Vicki Been and Sophia Moreau, in whose law classes I was a student, and Professor Helen Hershkoff, for whom I served as a Research Assistant. They may be reached as follows:

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Please do not hesitate to let me know if I can provide you with any additional information. Thank you for your consideration.

Respectfully,

Caleb Hersh

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EDUCATION**NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, NY

Candidate for J.D., May 2024

Unofficial GPA: 3.79

Honors: Florence Allen Scholar (Top 10% of the class after four semesters)
New York University Law Review, Articles Editor & Quantitative Editor
 Moelis Urban Law & Public Affairs Fellow—*paid fellowship to conduct housing law research*
 Dean's Scholar—*partial tuition scholarship based in part upon academic merit*

Activities: Orison S. Marden Moot Court Competition, Semifinalist (2022–23)
 American Constitution Society, Board Member-at-Large (2022–23)

Note: *The NIMBY Filibuster: Zoning Protest Petitions, the Fourteenth Amendment, and Affirmatively Furthering Fair Housing* (in progress)

BROWN UNIVERSITY, Providence, RI

Master of Public Affairs (MPA), Data-Driven Public Policy Track, May 2018

Cumulative GPA: 4.0

BROWN UNIVERSITY, Providence, RI

A.B. in Political Science, May 2017

Cumulative GPA: 3.79

Honors: Departmental Honors in Political Science
 Thesis: *Nonpartisan Elections and the North Carolina Supreme Court, 1995–2013*

EXPERIENCE**UCLA VOTING RIGHTS PROJECT**, Los Angeles, CA

Legal Fellow, Summer 2023

Participate in all aspects of the Project's current voting rights litigation. Draft and edit court filings, conduct legal and factual research, and organize discovery materials to prepare attorneys for depositions and upcoming trials.

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, New York, NY

Legal Intern, Summer 2022

Drafted model legislation to remedy discrimination in cooperative housing sales. Analyzed agency authority related to proposed fair housing initiatives. Performed legal research regarding state preemption of exclusionary zoning ordinances.

PROFESSOR HELEN HERSHKOFF, NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

Research Assistant, Summer 2022

Assisted Professor Hershkoff in the development of a course on impact litigation. Researched the role of impact litigators in the legal profession and the historical development of impact litigation as a distinct branch of legal practice.

WESTCHESTER COUNTY BOARD OF LEGISLATORS, White Plains, NY

Legislative Aide to Legislator Catherine Borgia, September 2018–June 2021

Managed all office operations—assisted constituents with county agency interactions, disseminated information about county government services, planned outreach events, conducted research on potential legislation, coordinated intern hiring and project supervision, cultivated media relations, and drafted statements and letters. Staffed the Board's Voting Reform Working Group, assisting legislators in drafting report on election reform implementation.

ADDITIONAL INFORMATION

Former Trustee of the micro-loan nonprofit Ossining Micro Fund (November 2019–September 2021). Hiked all forty-six Adirondack high peaks. Published sleep research study: Caleb Hersh, Julia Sisti, Vincent Richiutti & Eva Schernhammer, *The Effects of Sleep and Light at Night on Melatonin in Adolescents*, 14 HORMONES 399 (2015).

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	All other JD and LLM (Non-Mandatory)
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	Maximum for A tier = 31%
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	Maximum grades above B = 57%
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

<i>Pomeroy Scholar:</i>	Top ten students in the class after two semesters
<i>Butler Scholar:</i>	Top ten students in the class after four semesters
<i>Florence Allen Scholar:</i>	Top 10% of the class after four semesters
<i>Robert McKay Scholar:</i>	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

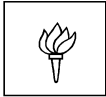
Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

**New York University***A private university in the public service***School of Law**

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 New York, NY 10012-1099

Helen Hershkoff

Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
 Co-Director, The Arthur Garfield Hays Civil Liberties Program

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Email: helen.hershkoff@nyu.edu

June 5, 2023

Dear Judge:

I am happy to recommend Caleb Hersh for a judicial clerkship with you following his graduation from New York University School of Law in May 2024. Caleb is an editor of the NYU Law Review and also an active participant in the Marden Competition. He enjoys learning about the law and worked as a county legislative aide before coming to Law School. His intelligence, reliability, and writing skills would in my view make him an excellent judicial clerk.

I met Caleb via Zoom during his first year at NYU when he applied to be a Research Assistant. He made a very positive impression—articulate, enthusiastic, engaged—and I had no reservations in offering him a position. Caleb’s assignment related to a project on litigation strategy, specifically, when public interest organizations seeking to challenge laws, regulations, or practices should opt for single-client, single-claim litigation rather than class actions or other aggregative suits. Caleb focused on a professional dimension of the project, namely, why lawyers of all ideological stripes tend to disparage single-case litigation as intellectually less interesting than suits in which multiple parties are joined. I asked him to review the literature, if any, on why law reform work (and specifically impact litigation) is perceived in the legal world as relatively more prestigious—at least within the umbrella of “public interest law”—than strictly individual-focused representation. I also asked Caleb to review the literature on advocacy work that variously is described as “political lawyering” and “impact work” to get a sense of how commentators describe the strategic choices and tradeoffs made by lawyers who aim to achieve law reform through their legal work (and whether there even *is* a specific set of tools of the trade for this line of work). And finally, I asked him to survey the literature on procedural neutrality and how it affects the characterization of advocacy choices regarding single-case or aggregated lawsuits. As these broad descriptors suggest, the research required Caleb to exercise judgment, to be intellectually nimble, and to avoid getting lost in rabbit holes. Caleb proved himself to be highly adept and produced a well written and useful literature review providing exceptionally helpful background for the project.

Caleb’s experiences before coming to NYU reflect his intellectual versatility and range of skills. While working as a county legislative aide, he also served as a board member for the Ossining Micro Fund, a nonprofit organization that delivers no-interest loans to community members with low incomes who are facing difficult-to-afford one-off expenses (such as a car

June 5, 2023

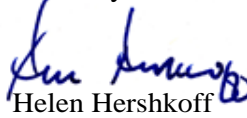
Page 2

repair or rental security deposit). In this capacity, Caleb interacted with applicants who faced difficult situations, came from marginalized communities, and often had to hurdle complex and even discriminatory bureaucratic barriers. It was important to communicate in simple but not simplistic ways, to be empathetic, and to remain calm—all skills that I think would contribute to his work in chambers.

Caleb's intelligence, excellent research and writing skills, and reliability are all qualities of an excellent judicial clerk and I recommend him with warm enthusiasm.

Thank you for your consideration.

Sincerely,



Helen Hershkoff



UNIVERSITY OF TORONTO

FACULTY OF LAW

June 3, 2023

RE: Caleb Hersh, NYU Law '24

Your Honor:

I am writing to give my strongest recommendation of Mr. Caleb Hersh, a student at NYU School of Law who is applying for a clerkship with you. I am Professor of Law and Philosophy at the University of Toronto Faculty of Law, and I am myself a former law clerk, having clerked for Chief Justice Beverley McLachlin of the Supreme Court of Canada in 2002-03. I came to know Caleb extremely well this past fall because he was one of the two top students in my 2L and 3L seminar on "Theories of Discrimination Law" at NYU School of Law. Given my past experience clerking and twenty years of teaching the top law students in Canada, many of whom have also gone on to clerk at our Supreme Court, I can confidently say that Caleb ranks among the best students whom I have taught and whom I have recommended for clerkships. He has all of the attributes that make for a first rate law clerk: very high intelligence and superb analytic skills, along with an ability to cut right to the heart of a legal issue; excellent research and writing skills; and something that I consider to be of great importance, which is a deep maturity in his understanding of the social effects of different laws, the real impact they have on various groups of citizens. Some law students come across as young and less than worldly. Caleb has all the energy and optimism of the young, combined with a real-world awareness of politics and society that makes his analyses of legal problems much richer than the analyses provided by his peers. (I think this is reflected in his recent stellar grades this past term, as he has moved into more specialized courses that require the kind of deep thinking and broad perspective that he is so talented at bringing to his legal analyses).

Let me tell you in more detail about Caleb's work for my class. The class was a seminar in the field of discrimination theory, which combined studies in comparative anti-discrimination law (looking at the US, Canada, the EU and the UK) with philosophical work on what makes discrimination wrongful. The texts we read were quite challenging, ranging from legal judgments to academic commentaries on cases to difficult philosophical articles. Caleb rose to every challenge, contributing to every discussion thoughtfully and helpfully, both in class and on our weekly online discussions that we would have before each class. He was always engaged with his peers in addition to being engaged with the material, responding with deep respect for the other students but never afraid to disagree and lay out his own different ideas. Caleb also came several times to my office hours (very few students did) to pursue lines of argument in greater detail and to ask for recommendations for further reading. He has terrific initiative, and yet never comes across as pushy or as trying to please: he is just genuinely excited by legal questions and has a

Caleb Hersh, NYU Law '24
June 3, 2023
Page 2

deep commitment to trying to resolve legal problems in a way that is attentive to the impact of laws on many social groups.

Caleb's written work for my class was superb. Students in this seminar were given the opportunity to choose their own essay topics if they wished, and he chose to write his first essay on "Race-norming: An Anti-subordination Account of *G.M.M. Ex Rel. Hernandez-Adams v. Kimpson*." Caleb provided a very sophisticated analysis of race-norming and a fascinating and plausible explanation of its wrongness by appealing to Professor Cass Sunstein's anti-caste principle and offering a detailed discussion of the dynamics of subordination. His second paper, which I believe he is submitting as a writing sample along with his clerkship application, considered some of the difficulties that might be faced by plaintiffs if, as certain Canadian legal scholars have recommended, legislatures or courts were to recognize a new tort of "negligent discrimination." In this paper, Caleb focussed specifically on the context of medical malpractice and considered the problems that plaintiffs might face when trying to bring claims of negligent discrimination in this context, given the deference that courts normally pay to professional custom when they assess the standard of care. His paper, as you will see, is nuanced without ever getting lost in the details; is well researched; puts together ideas from different areas of law and theory in novel and very fruitful ways; and is sensitive to the needs of marginalized social groups and to political and legal realities.

I am sure that Caleb will go on to make a significant contribution to the legal profession. For selfish reasons, I hope he will one day consider moving into academia, since he is just so full of creative ideas and fascinating suggestions! But I gather he has in mind a career in impact litigation within the voting rights or fair housing fields –which would be a wonderful use of his talents and his commitments. I am sure that the skills he would gain from a clerkship would serve him very well in such work.

I have not mentioned Caleb's many accomplishments and activities in law school, only because I am assuming you will read these for yourself and can form your own judgments about them. But before I close, I should just highlight his involvement in the NYU Law Review, his internship last summer at the NYC Department of Housing Preservation and Development, and his upcoming summer as a Legal Fellow with the UCLA Voting Rights Project. All of these are both achievements in themselves and sources of excellent background experience for a prospective law clerk.

Caleb Hersh, NYU Law '24
June 3, 2023
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For all the reasons I have indicated, I give Caleb my highest recommendation for a clerkship with you. I would be happy to speak to you further about Caleb and his work over the phone: please feel free to contact me at 1-416-846-2817.

Sincerely,



Professor Sophia Moreau
HLA Hart Visiting Fellow, Oxford (2023)
Visiting Professor of Law, NYU (Fall 2022)
Professor of Law and Philosophy, University of Toronto

**New York University***A private university in the public service*

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Vicki L. Been*Judge Edward Weinfeld Professor of Law**Faculty Director, Furman Center for Real Estate and Urban Policy**Associated Professor of Public Policy at NYU's Robert F. Wagner Graduate School of Public Service*

June 12, 2023

RE: Caleb Hersh, NYU Law '24

Your Honor:

Caleb Hersh has asked me to write to you about his qualifications to serve as your law clerk for the term beginning in the fall of 2024. I am delighted to do so, because Caleb has been a special treat to work with, and I am confident that he will make a terrific clerk. He is exceptionally bright, personable, hard-working and conscientious, and writes well and easily.

I first met Caleb through the Moelis Urban Law and Public Affairs Fellows program, a scholarship one of the nation's leading affordable housing developers established to support promising law students who have shown a passion for housing, land use, and urban policy issues. Fellows participate in a series of events that expose them to cutting edge work on those issues, and are required to spend at least one summer and one semester working for non-profit organizations, developers, government agencies, or research centers devoted to urban policy. I am a faculty advisor for the Moelis program, and get to know the fellows in that capacity. From the moment I met Caleb at one of the program's first events for his class, I was impressed by his incredible love of learning, sustained commitment to issues of public policy, and unassuming charm.

Caleb enrolled in a Colloquium I taught this spring that surveyed the ways in which local, state, and federal governments are requiring a variety of different types of impact analyses to predict or review the ways in which policies and decisions in environmental, land use and housing are hindering or advancing racial equity. Those tools pose a myriad of legal and policy issues, especially given the Supreme Court's pending decision about the use of race in the admissions decisions of colleges and universities.

The colloquium featured guest lectures from a number of experts who had either designed or critiqued such impact assessment tools, and I required students to submit questions for those experts in advance of their visits to the class. Caleb consistently asked the guests questions that were probing, perceptive, and generative. In our discussions with guests and in background sessions, Caleb's comments and questions added significant depth to the discussion. He often made connections or saw angles to an argument that his peers missed. While unfailingly polite and generous, he followed up when arguments weren't persuasive, and suggested ways of thinking about the problems that showed the value of both his graduate work in public policy and the strength of his legal acumen. Caleb objectively sees

Caleb Hersh, NYU Law '24

June 12, 2023

Page 2

the weaknesses of arguments on both sides of a debate, and is tenacious in working through difficult problems.

The colloquium also required students to submit two critiques of tools they had discovered in use around the world. Caleb's first paper drew on what he was learning in a seminar on theories of discrimination to explore whether programs local governments are adopting to provide reparations for past racial discrimination will survive legal challenge. He argued that the Supreme Court increasingly is importing tort causation doctrines into discrimination law, as evidenced in part by the "robust causality" requirement it imposed for disparate impact claims under the Fair Housing Act. In Caleb's view, the courts are likely to find the causal link between a local government's prior racial discrimination and reparations programs too attenuated to survive scrutiny. Caleb did a stellar job of weaving together legal and philosophical theory, precedent, and details about reparations programs to assess the viability of the programs. The paper was concise, clear, and a pleasure to read.

Caleb's second paper evaluated whether participatory budget programs that many local governments are adopting are a promising tool for achieving racial equity. Again, his attention to the pragmatics of how programs actually work, combined with his keen insights about the limits of participatory budgeting, resulted in an excellent paper. He was careful and thorough in his research for the paper, and astute in his critique.

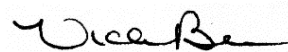
In the next academic year, Caleb will provide research assistance for some of my projects, and write his note about zoning protest petitions, which give landowners abutting an area proposed for rezoning the ability to force a supermajority vote on the zoning change. Caleb's intellectual curiosity, the breadth of his interests, his sharp mind, and his determination to find solutions to critical public policy challenges all make me excited about the chance to work with him on those projects.

Another one of Caleb's "super-powers" is his efficiency and time management skills. He has managed to juggle an impressive range of activities – from serving as executive editor of the Law Review, to participating in the moot court competition, to being a research assistant – all while amassing an impressive record of academic success.

Caleb also is a joy to work with. He has an easy, down-to-earth, and up-beat manner and ready sense of humor. He has a strong sense of ethics and integrity, shows excellent judgment, and is mature and level-headed.

Caleb is one of those students who makes teaching such a great job. His exceptional intelligence and strong writing skills will make him an excellent law clerk. I enthusiastically recommend him to you – he'll be a valued member of your family of clerks.

Sincerely,



Vicki Been

Caleb Hersh
495 Saint Johns Place, Apt. 3B
Brooklyn, NY 11238
ceh8766@nyu.edu
(914) 907-3505

Writing Sample – Seminar Paper

This writing sample was a paper I submitted for my Theories of Discrimination Law Seminar in Fall 2022, for which I received an A grade. The seminar was taught by Professor Sophia Moreau. The paper is entirely unedited by others and did not receive professor or other feedback.

APPLYING A TORT THEORY OF NEGLIGENT DISCRIMINATION TO MEDICINE:
HEADWINDS FOR PLAINTIFFS IN THE PROFESSIONAL MALPRACTICE STANDARD OF CARE

CALEB HERSH

Discrimination law in the United States is becoming increasingly “tortified.” It is now unremarkable for courts to analogize the elements of liability under antidiscrimination statutes to those of common-law torts.¹ At a high level, this is a straightforward comparison. Like tort law, discrimination law is often enforced through the private recovery of money damages, and encompasses civil wrongs occurring outside contractual relationships. In practice, though, the importation of tort concepts into discrimination law has served a specific end. As Professor Sandra Sperino notes, the courts have principally imported tort law’s liability-*limiting* concepts, and have done so to serve the goal of similarly limiting defendants’ liability in discrimination suits.² Sperino suggests that civil rights lawyers should respond to this trend by looking to tort concepts to articulate more plaintiff-friendly readings of the two discrimination liability theories—disparate treatment and disparate impact—currently recognized in American law. But other scholars propose something altogether more expansive: that courts should embrace tort concepts to recognize entirely new theories of liability for discrimination. Most prominent among these theories is that of *negligent discrimination*. Whether recognized through statutory interpretation, established through a new common-law tort, or legislatively enacted, negligent discrimination could afford

¹ See, e.g., *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011) (referring to an antidiscrimination statute, the Uniformed Services Employment and Reemployment Rights Act, as “a federal tort” adopted against “the background of general tort law”); see also Sandra F. Sperino, *Let’s Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107, 1109–14 (2014) (describing analogies between tort concepts and discrimination law made in recent Supreme Court jurisprudence); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1419 (2014) (suggesting that tort law is the current “model for civil rights law”).

² See Sperino, *supra* note 1, at 1107; Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 3 (arguing that the importation of common-law proximate cause into employment discrimination jurisprudence is overly liability-limiting).

plaintiffs a private cause of action for many unintentional but discriminatory wrongs that neither discrimination statutes nor tort law currently remedy.³

This Comment takes seriously the idea of establishing a negligence theory of discrimination. But the trend toward selectively importing tort law's liability-limiting concepts into discrimination law suggests caution. Any theory of negligent discrimination must account for the range of liability-limiting tort doctrines that could undermine plaintiffs' pursuit of these claims. This Comment accordingly identifies a tort concept that would present a likely headwind for plaintiffs hoping to establish negligent discrimination liability: the deference to professional custom embedded in the standard of care for medical malpractice. It contends that, should courts embrace a theory of negligent discrimination liability, under statute or through the common law, plaintiffs who bring these claims against physicians for discriminatory medical practices that are nonetheless consistent with professional standards would be unlikely to recover given current tort doctrine. Part I discusses the standard of care in medical malpractice cases and describes how it could limit physicians' liability for negligent discrimination. Part II suggests how negligent

³ See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900 (1993) (proposing a negligence theory of Title VII liability); Rakhi Ruparelia, *"I Didn't Mean It That Way!"*: *Racial Discrimination as Negligence*, 44 SUP. CT. L. REV. 81, 83 (2009) (arguing for a common-law tort of negligent racial discrimination). As both authors note, this is not an improbable idea. Current failure-to-accommodate claims in the context of religious, disability, and pregnancy discrimination under Title VII are "essentially based on" a negligence theory of duty. Oppenheimer, *supra*, at 936; see also *infra* notes 22–23 and accompanying text. Similarly, the Ontario Court of Appeal attempted to establish a common-law tort of discrimination. The Supreme Court of Canada overturned this ruling on appeal, but nonetheless "commended" the lower court for its "'bold' attempt to advance the common law." Ruparelia, *supra*, at 81 (quoting *Seneca Coll. of Applied Arts & Tech. v. Bhadauria*, [1981] S.C.R. 181, 195 (Can.)).

discrimination theory might account for this built-in liability limitation in the medical context. Part III briefly concludes.

I

NEGLIGENT DISCRIMINATION AND THE MALPRACTICE STANDARD OF CARE

Among the three recognized tort duties that govern medical practitioners' obligations to their patients, malpractice—unlike breach of informed consent or fiduciary duty—uniquely uses a deferential standard of care. As this Part will discuss, malpractice is likely the only doctrine from which a theory of negligent discrimination could be analogized in cases involving the discriminatory delivery of medical treatment. Moreover, a discrimination defendant-friendly court may look to the malpractice standard of care as a limiting principle. Thus, the deferential standard of care afforded to physicians in malpractice cases would become part of the analytical framework from which courts would understand a negligent discrimination tort theory. If then used to set the standard of care for negligent medical discrimination, it could significantly constrain plaintiffs' potential for recovery.

The duty of a physician to obtain informed consent (and against their negligent failure to disclose treatment risks) covers a range of conduct implicating a patient's freedom to choose treatment. But medical discrimination often stems from a physician failing to account for theirs, or their profession's, biases in delivering a *freely chosen* course of treatment. Breach of informed consent is thus too narrow of a tort to properly ground a duty against negligent discrimination.⁴

⁴ See Mary Crossley, *Infected Judgment: Legal Responses to Physician Bias*, 48 VILL. L. REV. 195, 249 (2003) (discussing how breach of informed consent plaintiffs bear more exacting burdens of proof for causation than do medical malpractice plaintiffs). An additional barrier to analogizing a theory of negligent discrimination to breach of informed consent is that a *discriminatorily* inadequate disclosure of treatment risk may result not from a complete failure to inform, but from a disclosure being packaged in a way that fails to take full account of “cultural and contextual issues” stemming from historic discrimination, which may give a patient reason to distrust the medical profession. McKenzi B. Baker, Note, *Made Whole: The Efficacy of Legal Redress for Black Women who Have Suffered Injuries from Medical Bias*, 57 HARV. C.R.-C.L. L. REV. 321, 351 (2022) (discussing how distrust of the medical profession is a “glaring issue particular to the Black community” that renders breach of informed consent inadequate to remedy medical discrimination).

Nor does breach of fiduciary duty present an appropriate tort duty from which to analogize a negligent discrimination theory. A physician's tortious breach of fiduciary duty to a patient may stem from their negligent failure to disclose personal conflicts of interest.⁵ But even if such an obligation could be adapted to require a physician's "self-reflective assessment . . . to identify and screen out any [discriminatory] bias," extending the duty of disclosure to cover discrimination would suggest that the physician could satisfy it by *disclosing their biases to the patient*—a response that is "neither probable nor desirable."⁶ That leaves malpractice—the negligent delivery of medical treatment itself—from which to derive a negligent discrimination theory of liability for physicians.

That malpractice is the most appropriate tort from which to analogize negligent medical discrimination is highly consequential for how the standard of reasonable care would be set. In most negligence cases, industry custom can be relevant in determining the reasonableness of an actor's conduct, but on its own cannot conclusively establish whether or not a defendant was negligent.⁷ For professional malpractice, however, the standard of care "is to a significant extent defined in terms of professional standards and customs."⁸ The elements of tort liability for negligence—a duty of reasonable care, a breach of that duty, and a (factually and proximately) causal relationship between the defendant's breach and the plaintiff's injury⁹—become linked to

⁵ See Crossley, *supra* note 4, at 250 ("[T]he physician's fiduciary obligation requires, at a minimum, that he inform patients of any subjective motives that might influence his professional judgment.").

⁶ *Id.* at 252, 255. Crossley also notes that the doctrine governing physicians' fiduciary duties in tort to their patients is the least developed of the medical tort doctrines. Many courts do not recognize breach of fiduciary duty in medicine as a tort at all, or only recognize it in cases where a physician has acted dishonestly or abusively. See *id.* at 252–53 ("A few courts have given teeth to physicians' fiduciary obligations, but many of these cases have involved physician dishonesty or abuse of power, arguably separate from the physician's actual treatment or diagnosis of the patient.").

⁷ See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 13(a)–(b) (AM. L. INST. 2010) (stating that an actor's compliance or departure from community custom may be evidence of negligence or non-negligence, but neither precludes nor requires a finding of negligence).

⁸ *Id.* § 13 cmt. b.

⁹ See *id.* § 6 ("An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable.").

whether the defendant adhered to professional custom. A medical malpractice plaintiff must therefore demonstrate 1) the basic norms of medical care applicable to the defendant-practitioner, 2) that the defendant deviated from those norms, and, 3) a causal relationship between the *deviation* and the injury.¹⁰

The headwind that an industry-determined standard of care presents for a negligent discrimination theory is this: many of medicine's discriminatory practices *are* its basic norms.¹¹ The following hypothetical is illustrative. In pulmonology, a spirometer is a common device used to evaluate lung capacity. Spirometer measurements are routinely "race-corrected" based on incorrect and centuries-old racist assumptions about supposedly innate racial differences in lung capacity.¹² There is no scientifically valid reason to make this correction (nor, for that matter, any scientifically valid means of determining a patient's race).¹³ And yet, race-correction is not only standard medical practice, but is "built into the software of [spirometers] globally."¹⁴

Imagine that a U.S.-based patient is injured after being misdiagnosed because of the race-correction applied to their lung capacity measurement and wants to sue for compensatory damages.

¹⁰ *E.g.* *Lama v. Borrás*, 16 F.3d 473, 478 (1st Cir. 1994). *But see* Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163, 163–64 (2000) (suggesting that some states have recently moved away from complete deference to custom and toward a "reasonable physician" standard).

¹¹ *See, e.g.*, Sidney D. Watson, *Race, Ethnicity, and Quality of Care: Inequalities and Incentives*, 27 AM. J.L. & MED. 203, 205–07 (2001) (outlining ways in which "[r]ace and ethnicity are consistently linked with different and poorer patterns of health access and treatment").

¹² *See, e.g.*, Hamza Shaban, *How Racism Creeps into Medicine*, THE ATLANTIC (Aug. 29, 2014), <https://www.theatlantic.com/health/archive/2014/08/how-racism-creeps-into-medicine/378618> (discussing the spirometer issue).

¹³ *See id.* (discussing how most physicians surveyed simply assume the patient's race by "eyeball[ing]"). There is some legitimate debate over the utility of the lung capacity assumption as a shorthand to assess *public health*—due to residential segregation, a disproportionate number of people of color in the United States live in higher-pollution areas, which could contribute to aggregate differences in lung capacity. *See id.* (noting that "scientific studies [have shown] that people who live around high pollution areas have lower lung capacity" and that "[h]igh pollution areas also map onto minority status," but "environmental or socioeconomic explanations for differing lung capacity" are, for one reason or another, taken less seriously by physicians than racist assumptions about supposedly innate racial difference). Regardless, there is no scientifically valid reason for an *aggregate* difference caused by discrimination to form the basis of an assumption about an *individual's* biology in the context of an individual health assessment. *See id.* (stating that "the use of race as a social category is entirely appropriate to study the health effects of a discriminatory social world" but completely inappropriate "as a natural/scientific category to study genetic difference").

¹⁴ *Id.*

This plaintiff would have difficulty recovering under a discrimination theory. Discrimination statutes' coverage of medical settings is mixed and complex.¹⁵ Assuming the plaintiff could find a suitable statute under which to bring a claim, proving disparate treatment (the prerequisite for recovering money damages under any applicable statute) would be an uphill battle. Even if the physician's diagnosis was the direct result of the spirometer's assessment, the racist assumption underlying the misdiagnosis was built into the spirometer's functionality, rather than stemming from the physician's own cognitive bias.¹⁶ And even if the physician was consciously aware of the race-correction, many courts have found the "intent" required to establish disparate treatment liability to be something "akin to animus or mens rea"¹⁷—a narrower standard than just intent to make a diagnosis plus awareness of the race-correction (the analogous tort law intent standard).¹⁸ The doctor's misdiagnosis, in reliance on a racist assumption, is more akin to conduct "that might

¹⁵ Title VI of the Civil Rights Act of 1964, for example, only covers race discrimination in medical settings that receive federal funding, and does not cover other grounds of discrimination. *See Crossley, supra* note 4, at 263 ("A patient who believes that her race, color or national origin influenced her physician's choice of her medical treatment may assert that the physician's actions violated Title VI of the 1964 Civil Rights Act."). Moreover, only proof of intentional discrimination (disparate treatment) would entitle the plaintiff to money damages. *See id.* at 268 n.267 (collecting cases). Title IX's prohibition on sex discrimination in education would plausibly cover teaching hospitals, but only covers sex as a protected ground and likely does not extend to patients. *See id.* at 271 ("Title IX's protection from sex discrimination may be limited to students and employees of federally funded education programs."). Section 504 of the Rehabilitation Act of 1973 provides for recovery of money damages for disability discrimination by medical providers receiving federal funding, but has similar limits in scope to Title VI given its federal funding requirement, does not cover grounds other than disability, and requires proof of disparate treatment for a plaintiff to recover money damages. *See id.* at 272–73. Finally, the Americans with Disabilities Act prohibits disability discrimination by health care providers, but is again only limited to disability discrimination, and allows recovery of money damages by individual plaintiffs only against public health care providers. *See id.* at 272–73.

¹⁶ This situation is analogous to a so-called "cat's paw" case, where "a biased individual takes an action against another person based on a protected trait, but an unbiased individual ultimately makes the challenged . . . decision." Sperino, *supra* note 2, at 4. In these cases, however, the focus of the intent analysis is on the actor who made the biased decision beginning the causal chain to the plaintiff's disparate treatment. *See id.* at 5. This creates a problem for the plaintiff in our spirometer hypothetical: Assuming the physician passively accepted the spirometer output as accurate, the biased "decision" was itself made by a machine, which cannot form intent.

¹⁷ Sperino, *supra* note 1, at 1119.

¹⁸ *See Crossley, supra* note 4, at 289 (describing how much racial bias in medical decision-making is unconscious and not the result of provable animus).

be deemed ‘negligent.’”¹⁹ As the sought-after remedy is money damages, this case presents the type of wrong that a negligent discrimination liability theory might remedy.

This patient’s ability to recover for negligent discrimination, however, would run headlong into the same defense the physician would offer had the patient sued for malpractice. Race-corrections in spirometer measurements are customary in medicine. The physician would have no trouble defeating a malpractice claim by showing that they adhered to this professional custom. “[E]ven if the plaintiff [could] show that, but for his race, his doctor would have chosen a different diagnostic approach . . . within the standard of care . . . [that was] more likely to detect his condition,” the plaintiff would “still lose because he has not shown the defendant failed to conform to the standard of care.”²⁰ If negligent discrimination in medicine is treated like malpractice, the standard of care would likewise be tied to medical custom. Indeed, the more systematic the discriminatory medical practice, the *less successful* plaintiffs’ claims would be, as the standard of care defense would be stronger. A different standard of care is needed for a negligent discrimination theory to give these plaintiffs a shot at recovery.

II

ALTERNATIVES TO THE MALPRACTICE STANDARD OF CARE

If the past twenty years of caselaw is any indication, courts may find it tempting to import the deferential malpractice standard of care to a negligent discrimination tort to limit physicians’ liability for medical discrimination.²¹ How might theorists of negligent discrimination avoid this trap? This Part poses two possibilities. First, a negligent discrimination theory could allow for a

¹⁹ *Id.* at 288 (quoting Oppenheimer, *supra* note 3, at 967–72).

²⁰ *Id.* at 247.

²¹ *See* Sperino, *supra* note 2, at 50 (discussing how the Supreme Court imported a “vague and amorphous” concept of agency from tort law to limit defendants’ liability in employment discrimination cases, and in future cases will likely “find ways to use proximate cause to render summary judgment in favor of the employer, even in cases that should arguably proceed to jury trial”).

plaintiff to identify a less discriminatory alternative to a defendant's conduct as a means of proving a breach of the standard of care, even in medical discrimination contexts. Second, negligent medical discrimination could be grounded in an additional tort duty of physicians to abide by their ethical responsibilities, which themselves include an obligation not to discriminate.

The “less discriminatory alternative” test is already built into the elements of disparate impact liability for employment discrimination.²² As Professor David Oppenheimer notes, this responsibility is essentially a tort duty against negligence. Employers must determine “whether a less discriminatory alternative [selection device] that meets [their] legitimate needs exists,” and are liable for failing to do so—that is, for failing to take reasonable care to avoid foreseeable risks in the face of a demonstrably low burden of precaution.²³ The less discriminatory alternative test has the advantage of providing a roadmap for negligent discrimination liability that is both well-established in discrimination law, and well-grounded in tort theory.

Courts may hesitate to adopt this test, however, precisely *because* it tracks the non-deferential reasonable care standard. The professional standard of care has a policy rationale behind it. Judges are reticent to intrude upon the expert judgment of other skilled professionals, and many fear that a less deferential standard would encourage doctors to avoid high-risk, high-reward treatments.²⁴ Courts may also fear that adopting a less discriminatory alternative test for negligent medical discrimination may encourage malpractice plaintiffs to transform malpractice

²² Under the 1991 Civil Rights Act, a plaintiff may establish disparate impact liability under Title VII by showing that a less discriminatory employment practice exists that meets an employer's legitimate need, but the employer refused to adopt it. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii); Oppenheimer, *supra* note 3, at 935 (“[E]mployers are . . . liable for the harm caused to women or minority applicants if they adopt a selection device which is discriminatory in its effects when the risk of such a discriminatory result could have been avoided by using a less harmful selection device.”).

²³ Oppenheimer, *supra* note 3, at 933; *see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. e (AM. L. INST. 2010) (“The actor's conduct is . . . negligent if the magnitude of the risk outweighs the burden of risk prevention.”).

²⁴ *See* Peters, *supra* note 10, at 195 (summing up rationales for the deferential standard as articulated in caselaw); Alex Stein, *Toward a Theory of Medical Malpractice*, 97 IOWA L. REV. 1201, 1205–06 (2012) (same).

claims into discrimination claims. Even if a portion of these discrimination claims turn out to be non-meritorious, some plaintiffs may nonetheless win them because they would be brought in high volume, contemporaneously with most malpractice claims, and would accordingly chip away at the policy behind the deferential standard of care. Practically, this possibility reduces the likelihood that a less discriminatory alternative test could gain traction.

A second possible framework, “ethical malpractice,” could ground negligent medical discrimination claims within a tort duty that *embraces* the deferential standard of care. At present, courts reject the idea that professional ethics standards conclusively establish legal duties of care.²⁵ But as Professor Nadia Sawicki points out, some courts do treat medical ethics rules as relevant evidence in establishing the prevailing medical custom in malpractice cases.²⁶ For as much as medical discrimination occurs in practice, non-discrimination may be an aspirational ethical principle that is “so well established in modern medical practice” that the common law could plausibly develop to recognize it “as a basis for civil recovery when breaches occur.”²⁷ The advantage of grounding negligent discrimination in an (actionable) ethical obligation is that it does

²⁵ Nadia N. Sawicki, *Ethical Malpractice*, 59 HOUS. L. REV. 1069, 1101 (2022) (“As a general matter, courts uniformly reject the idea that ethical standards establish a legal duty of care . . .”).

²⁶ *See id.* at 1108 (“In a substantial number of cases where plaintiffs introduce evidence about the ethical standards of the profession when arguing about the standard of care or breach of duty, courts recognize that these standards may have some legal relevance.”).

²⁷ *Id.* at 1134; *see also* AMA Code of Medical Ethics: Opinion 8.5, *Disparities in Health Care*, AM. MED. ASS’N, <https://code-medical-ethics.ama-assn.org/sites/default/files/2022-08/8.5.pdf> (last visited Dec. 5, 2022) (establishing that physicians are ethically obligated to “[e]xamine their own practices to ensure that inappropriate considerations about race, gender identify [sic], sexual orientation, sociodemographic factors, or other nonclinical factors, do not affect clinical judgment”).

not require forfeiting the professional standard of care. It merely establishes that the professional standard of care is “imbued with specific and explicit attributes of non-discrimination.”²⁸

Unfortunately, ethical malpractice is not even close to an established doctrine.²⁹ Putting it in practice would involve convincing courts to establish a tort duty of physicians to abide by professional ethics rules, in addition to the duty not to discriminate. Which ethics breaches would be independently actionable, and which would not? This would be a thorny question that judges may not wish to resolve for other professionals by fiat, just to allow negligent discrimination claims to proceed. For its advantages over the less discriminatory alternative test in not disrupting settled standard of care doctrine, establishing ethical malpractice as a tort duty on its own may prove more conceptually difficult to implement.

III CONCLUSION

If the courts recognize a negligence theory of liability for discrimination, importing the malpractice standard of care to this theory in medical settings could prove fatal to the claims of plaintiffs seeking to recover for injuries caused by their physicians’ unintentional but discriminatory practices. The existence of this built-in limitation, before even a single court has embraced negligent discrimination, suggests that proponents of a negligent discrimination tort theory must reckon with how liability-limiting tort doctrines operate in practice. A judiciary that is hostile to discrimination plaintiffs already has a full toolbox of tort concepts from which to limit liability. Scholars and practitioners who believe that establishing a tort duty against negligent discrimination could better vindicate the rights of subordinated individuals would do well to prepare some creative responses.

²⁸ Ruparelia, *supra* note 3, at 100 n.77.

²⁹ See Sawicki, *supra* note 25, at 1133 (“[R]ecognizing ethical malpractice as an independent cause of action may be premature.”).

Applicant Details

First Name	Edward
Last Name	Hershewe
Citizenship Status	U. S. Citizen
Email Address	edwardhershewe@yahoo.com
Address	<div> <div>Address</div> <div> <div>Street</div> <div>1121 S Gilbert St apt 406, 406</div> <div>City</div> <div>Iowa City</div> <div>State/Territory</div> <div>Iowa</div> <div>Zip</div> <div>52240</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	4174998353

Applicant Education

BA/BS From	Carleton College
Date of BA/BS	March 2020
JD/LLB From	University of Iowa College of Law
	http://www.law.uiowa.edu
Date of JD/LLB	May 12, 2023
Class Rank	Not yet ranked
Law Review/Journal	Yes
Journal(s)	Iowa Law Review
Moot Court Experience	Yes
Moot Court Name(s)	Van Oosterhout-Baskerville

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Sakoda, Ryan
ryan-sakoda@uiowa.edu
3194674864
Guernsey, Alison
Alison-guernsey@uiowa.edu
Diamantis, Mihailis
mihailis-diamantis@uiowa.edu
319-335-9105

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Edward Hershewe

1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

District Judge Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a third-year law student at Iowa College of Law, and I would like to be considered for the clerkship in your chambers for the 2024 term. I am particularly interested in a position in your chambers because of your experience working on white collar crime issues.

During my time at Iowa Law, I have developed strengths in legal research, analysis, and writing, and I know given these skills I will be an asset in the speedy resolution of federal cases. I believe that the best legal writing emphasizes clarity, consistency, and understandability. I have spent my time on the *Iowa Law Review*, in the Federal Criminal Defense Clinic, competing on the Baskerville Moot Court Team, and externing for the Honorable Willie J. Epps, Jr., focused on honing these skills. I look forward to continuing to hone these skills next year as an associate at Polsinelli in Kansas City where I will be working on complex civil matters.

Outside of my academic skills, I believe I have the attitude required to succeed as your clerk. While in college, I ran cross country and track. The teams were communities built on respect and commitment to achieving both individual and team success. We emphasized hard work but also ensured that the experience was enjoyable for all. I learned what it meant to work with others towards a common goal and how to pursue individual achievement at the same time.

I have enclosed my resume, writing sample, letters of recommendation, and transcript. Thank you for your time and consideration, and I look forward to hearing from you.

Sincerely,
Edward Hershewe

EDWARD HERSHEWE

1121 South Gilbert Street, Apt 406
ehershewe@uiowa.edu

Iowa City, IA 52240
 417-499-8353

Education

The University of Iowa College of Law, Iowa City, IA J.D., Anticipated May 2023
 GPA: 3.68 (Top 20% of the class)
 Activities: *Iowa Law Review*, Managing Editor 2022–23, Student Writer 2021–22.

Carleton College, Northfield, MN May 2020
 B.A. in History and Political Science
 GPA: 3.48
 Theses: History-*Conceiving Chivalry* | Political Science-*Crafting Cosmopolitan Conversations and Curriculums*
 Athletics: Varsity Cross Country and Track 2016–20, Team Captain 2019–20.

Experience

Polsinelli, P.C. **Kansas City, MO**
Associate Fall 2023 (anticipated)
Summer Associate Summer 2022

- Researched and drafted memorandum on state and federal law for civil litigation issues, including TCPA class actions, contract suits, insurance claims, medical malpractice, jury instructions, expert witness reports, and evidentiary issues relating to *Daubert* motions, hearsay, and business records for cases.

University of Iowa Federal Criminal Defense Clinic **Iowa City, IA**
Law Student Practitioner Jan 2023—present

- Represented a client in a 3-count felony drug indictment in the U.S. District Court for the Southern District of Iowa. Cross examined a case agent, researched and drafted a suppression motion, calculated U.S. Sentencing Guidelines ranges, drafted Rule 17 subpoenas, engaged in fact interviewing, and conducted client counseling.
- Mooted colleagues for Sixth and Seventh Circuit arguments.
- Researched and evaluated the strength of compassionate-release and executive clemency cases and the impact of potential U.S. Guidelines amendments.

Baskerville Moot Court Competition Team **Iowa City, IA**
Competitor Spring 2022—present

- Selected for participation on the competitive team after both oral and written performance in the law-school based Van Oosterhout-Baskerville Domestic Competition.
- Participated in the McGee Civil Rights Moot Court Competition. Drafted a brief and conducted oral argument on the quantum of proof required for administrative searches. Brief placed 6 out of 24.

United States District Court for the Western District of Missouri **Jefferson City, MO**
Judicial Intern to Magistrate Judge Willie J. Epps, Jr. Summer 2021

- Drafted memorandum regarding biometric search warrants and speedy-trial issues.
- Evaluated motions in civil and criminal matters and made disposition recommendations.
- Assisted in drafting and editing law review articles on Black judges in America, judicial outreach programs for at-risk youth, and various social justice issues.

INTERESTS: Reading · Chess · Running · Dungeons and Dragons · Outer Space · Music



STUDENT GRADE REPORT

Name: Edward Hershewe
University ID: 01424457
Month/Date of Birth: 07/04
Date Generated: 06/02/23 11:23 AM

Degree(s) from other institution(s):
 BA Carleton College, Northfield, MN 2020

Previous/Transfer institution(s) summary:
 Carleton College, Northfield, MN 2016-2020

*****START ACADEMIC RECORD*****

Course Number	Course Title	Sem Hrs	Grade
Fall 2020 / College of Law ¹			
LAW 8032	Legal Analysis Writing and Research I	2.0	3.4
LAW 8037	Property	4.0	3.4
LAW 8046	Torts	4.0	3.6
LAW 8017	Contracts	4.0	3.8
LAW 8026	Introduction to Law and Legal Reasoning	1.0	P

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	14.0	3.57	14.0	15.0
UI Cum:	14.0	3.57	14.0	15.0

Spring 2021 / College of Law ¹

LAW 8006	Civil Procedure	4.0	3.4
LAW 8460	Evidence	3.0	3.5
LAW 8033	Legal Analysis Writing and Research II	3.0	3.7
LAW 8010	Constitutional Law I	3.0	3.9
LAW 8022	Criminal Law	3.0	4.0

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	16.0	3.68	16.0	16.0
UI Cum:	30.0	3.63	30.0	31.0

Fall 2021 / College of Law

LAW 8146	Antitrust Law	3.0	3.5
LAW 8504	Corporate Crimes	3.0	3.6
LAW 9882	Public Health Law	3.0	3.7
LAW 8350	Criminal Procedure: Investigation	3.0	4.1
LAW 8121	Adv Legal Res Methods Specialized Subj Litigation and Alternative Dispute Resolution	1.0	P
LAW 9010	Appellate Advocacy I	1.0	P
LAW 9115	Law Review	1.0	P

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	12.0	3.73	12.0	15.0
UI Cum:	42.0	3.66	42.0	46.0

Spring 2022 / College of Law

LAW 8791	Professional Responsibility	3.0	3.6
LAW 8433	Environmental Law	3.0	3.8
LAW 8755	Nonprofit Org Advcy Collabrtm Fundraisng	3.0	3.8
LAW 8331	Business Associations	3.0	4.1
LAW 9021	Van Oosterhout Baskerville Mt Ct Comp	1.0	P
LAW 9115	Law Review	1.0	P

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	12.0	3.83	12.0	14.0
UI Cum:	54.0	3.69	54.0	60.0

Fall 2022 / College of Law

LAW 8399	Election Law	3.0	3.2
LAW 8497	Federal Criminal Practice	2.0	3.2
LAW 8373	Secured Transactions	3.0	3.3
LAW 8280	Constitutional Law II	3.0	3.7
LAW 9558	Corporate Boards Seminar	2.0	4.1
LAW 9037	Advanced Moot Court Competition Team	1.0	P
LAW 9060	Trial Advocacy	2.0	P
LAW 9118	Student Journal Editor-Law Review	1.0	P

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	13.0	3.48	13.0	17.0
UI Cum:	67.0	3.65	67.0	77.0

Spring 2023 / College of Law

LAW 8481	Federal Courts	3.0	3.2
LAW 9302	Clinical Law Program: Internship	9.0	4.0
LAW 9046	Moot Court Board	1.0	P
LAW 9118	Student Journal Editor-Law Review	2.0	P

LAW 8428	British Legal System	2.0	3.7
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	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	14.0	3.79	14.0	17.0
UI Cum:	81.0	3.68	81.0	94.0

¹University operations and instruction continued to adapt to the global public health emergency. Many course offerings and modalities were impacted, which in turn may have affected an individual student's experience in each course.

*****END ACADEMIC RECORD*****

Hours and Points Summary

The Hours and Points Summary includes transfer credit in the "Overall Cumulative" GPA and "Overall Earned" hours (not necessarily hours towards degree). This summary is only informational and will not appear on your official transcript. Your official transcript is only your University of Iowa hours and GPA as displayed above

	Hours	Points	GPA
UI Cumulative	81.0	297.70	3.68
Transfer Cumulative	0.0	0.00	0.00
Overall Cumulative	81.0	297.70	3.68
Overall Earned	94.0		
Transfer Earned			

April 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I enthusiastically recommend Edward Hershewe for a clerkship in your chambers with absolutely no reservations. I met Edward during his second year of law school when he was in my Criminal Procedure: Investigation course. Edward did tremendously well in the course, receiving one of the highest grades in the class. He has shown his exceptional abilities outside of the classroom as well. Edward is a managing editor of the Iowa Law Review, actively involved in moot court, and a dedicated clinical student.

Edward was one of the standout students in my Criminal Procedure: Investigation course. He was always well prepared and engaged in class, making valuable and interesting contributions during class discussions. Edward also frequently attended office hours to continue the discussions that were initiated in class, seeking to refine his understanding of the law. Not only did Edward have a strong interest in the subject matter covered in Criminal Procedure: Investigation, but it was abundantly clear that Edward has a genuine interest in learning the nuances and complexities of the law more generally. Edward did not simply ask questions with the aim of preparing for the exam, he sought a deeper understanding of the cases. I am confident that this inherent interest and desire to learn will be valuable in a clerkship and in his future legal career.

Edward's intelligence, diligence, and meticulous preparation were reflected in his final exam. His exam was one of the top three in the class of 43 students. His grade in the course, a 4.1, is one of the highest grades you can receive on the Iowa Law grading scale and, given Iowa's tough mandatory curve, reflects a truly superb performance in the course. My exam incorporated two complex issue-spotters and a policy question. Edward showed his thorough knowledge of the material in his responses to the issue-spotters as well as a tremendous ability to identify and discuss numerous legal issues under very tight time constraints. Furthermore, Edward demonstrated an impressive understanding of the nuances of the criminal procedure doctrine in his response to the policy question. Based on his performance in my course, I have no doubt that Edward would be a fantastic law clerk.

In addition, Edward's work outside the classroom further bolsters his qualifications for a clerkship. Edward is an active and valuable member of the law school community, participating in moot court, serving as the managing editor of the Iowa Law Review, and taking on peer advising and research assistant positions as well. His selection for the Baskerville Moot Court Team reflects his strong legal research, writing, and oral advocacy skills. Furthermore, the moot court competition gave him additional opportunities to refine and polish his skills in high pressure and competitive contexts. As a member of the Iowa Law Review, Edward was entrusted by his fellow law review members to be one of the managing editors. The role of the managing editor is among the most important on the law review, involving substantial communication with the authors of forthcoming articles, as well as substantive edits to the forthcoming articles. The managing editors also take on the important role of working with and mentoring student writers in the fall semester. Edward's selection as a managing editor not only reflects the respect that Edward's classmates have for his intellectual ability, but also their recognition of his ability to collaborate well with others and efficiently produce results under strict deadlines. Furthermore, Edward has gained valuable experience as a student in the Federal Criminal Defense Clinic, where he has provided direct representation for a client charged in Federal Court, researched and written briefs and motions, and appeared in court to argue on behalf of his client.

These valuable experiences along with Edward's tremendous research, writing, and analytical skills make him an outstanding candidate for a clerkship. Moreover, Edward is a joy to be around. I thoroughly enjoyed our conversations during office hours and after class. I have no doubt that Edward would be a wonderful addition to your chambers, and I recommend him for a clerkship with absolutely no reservations. I would be happy to answer any questions you have and can be reached at ryan-sakoda@uiowa.edu.

Sincerely,

Ryan T. Sakoda
Associate Professor of Law
University of Iowa College of Law

Ryan Sakoda - ryan-sakoda@uiowa.edu - 3194674864

April 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Edward Hershewe requested that I write a letter of recommendation on his behalf for a law-clerk position with your chambers, and I am happy to do so.

I am a Clinical Professor at the University of Iowa College of Law where I run the Federal Criminal Defense Clinic. As part of that Clinic, law students represent indigent defendants charged with offenses in the U.S. District Courts for the Northern and Southern Districts of Iowa. We also handle criminal appeals in the U.S. Courts of Appeals for the Eighth, Seventh, and Sixth Circuits.

Mr. Hershewe is one of the students enrolled in my Clinic, and I have interacted with him on a daily basis for the past five months. I also had the pleasure of supervising Mr. Hershewe as he competed on the Baskerville Moot Court Team. Given our close and consistent working relationship, I am confident in my understanding of Mr. Hershewe's strengths as a clerkship candidate. Although he has many qualities that would make him a wonderful clerk, there are three that I would like to highlight.

First, Mr. Hershewe is bright and intellectually curious. During his time in the Clinic, Mr. Hershewe has shown great comfort working on complex legal issues with comparatively little direction. As an example, Mr. Hershewe is counsel in a case that has involved the need to analyze the applicability of several relatively new U.S. Sentencing Guideline enhancements. These enhancements have huge consequences but have been interpreted very infrequently. Despite having never opened the Guidelines Manual before enrolling in Clinic, Mr. Hershewe was able to do a full sentencing workup without a single error and argue coherently for the position that we should take during plea negotiations based on his research. When I praised his accurate, efficient, and goal-focused work, he responded by telling me that reasoning through "regulations and statutes" was one of his "favorite tasks," as he simply enjoys "figuring out the puzzle."

This curiosity and intellect have emerged time and time again, as he helped moot fellow Clinic students for a habeas argument in the Seventh Circuit; a § 3582(c) argument in the Sixth Circuit; and a contested supervised-release revocation hearing in the Northern District of Iowa. Perhaps nothing demonstrates his love for knowledge and puzzles more than the fact that when I gave him the choice to present to the class on any non-legal topic of his choosing, he chose the Fermi paradox.

Second, Mr. Hershewe is a hard worker. He is the first student in the Clinic every morning —always before 8:00 am —and typically the last student to leave. His willingness to work is limited only by the hours in the day and whatever deadline the case or I have imposed. But that is not to say that Mr. Hershewe is unable to do anything other than work. He has a wonderful sense of humor and is a very enthusiastic storyteller. He makes the long hours enjoyable.

Third, Mr. Hershewe is a very strong legal researcher. In both my capacity as his professor and faculty advisor for moot court, I have had the opportunity to evaluate, in depth, Mr. Hershewe's research and writing skills, and they place him near the top. His writing is clear, and he has shown great skill in being able to distinguish and analogize authority in a convincing and accurate fashion. When I conduct my parallel research, I have yet to come across a case that he has not found and accounted for in his analysis.

In short, given his intellect, his work ethic, and his legal research and writing skills, I believe Mr. Hershewe would make a wonderful clerk. I recommend him without hesitation.

Sincerely,

Alison K. Guernsey
Clinical Professor

Alison Guernsey - Alison-guernsey@uiowa.edu

April 27, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of Edward Hershewe's application for a clerkship in your chambers. I have known Edward since Spring 2021, when he was a 1L in my Criminal Law course. He performed exceedingly well, receiving the sixth highest grade out of 90 students. Edward was quick on his feet and always prepared to answer questions, whether to display his appreciation of the relevant facts of a case or to hazard a position on a thorny policy issue. He was also an active force in class discussion, asking questions about challenging concepts and benefitting his fellow students in the process. During office hours and outside of class, Edward is unreserved and cordial.

I'd be happy to discuss Edward's application further using any of my above contact information above.

Sincerely,

Mihailis E. Diamantis
Professor of Law
University of Iowa
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The attached writing sample is an excerpt from an appellate brief I wrote for the Van Oosterhout-Baskerville Domestic Competition at Iowa College of Law during the 2022 spring semester. Specifically, I was required to draft a brief on behalf of the Appellant, the Big Box, who was being sued under ERISA for a breach of fiduciary duty by its former employee Wally Worker. As the appellant I argued the Seventh Amendment right to a jury trial does not apply to ERISA section in question and so the District Court had correctly struck the motion for a jury trial. To reduce the length of the document, Argument I and related sections have been omitted.

ISSUES PRESENTED

- II. The Seventh Amendment guarantees the right to a jury trial in suits at common law. The plaintiff is bringing an action under ERISA §502(a)(2) for reimbursement of a retirement account. Did the district court abuse its discretion by striking the jury trial?

SUMMARY OF THE CASE

Appellant, Big-Box Stores Inc. is a national retailer. R. at 3. Big-Box has five stores in the state of Hawkeye with over 360 employees. *Id.* Appellee was an employee of Big-Box in Hawkeye. *Id.* at 4. As a part of his employment, he received health insurance benefits and a retirement fund. *Id.* Under the health insurance plan, Appellant spent an average of \$1.24 on employee health care. *Id.*

At the time of Appellee's employment, Hawkeye had a law in place called the Hawkeye Health Act ("HHA"). *Id.* at 3. The law required that any for profit employer in Hawkeye had to pay a minimum of \$2 per hour worked by an employee towards employee healthcare. *Id.* at 8. To meet this minimum a firm could: (1) deposit money into a healthcare savings account belonging to the employee, (2) reimburse employees for healthcare expenditures, or (3) pay the city, who would create and maintain reimbursement accounts for the employees. *Id.*

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Appellee worked for Appellant for over a year before getting cancer. *Id.* at 4. While being treated, Appellee realized Appellant's average amount of spending on healthcare was below the minimum HHA requirements. *Id.* at 6. Appellee sued Appellant for violating the HHA and requested backpay. *Id.* at 11. Appellant moved for summary judgment on the HHA claim, arguing ERISA preempts the law. *Id.* at 13–14. The trial court held the act is not preempted and denied summary judgment. *Id.* at 18–19. Appellant appealed the denial of summary judgment. *Id.*

Appellee also sued claiming Appellant had breached its fiduciary duty. *Id.* at 11. Appellee alleged that the Howard Keel as sole manager of the retirement account owes fiduciary duties to Appellee. *Id.* Appellee contends that he was assured the funds would only be put in safe investments. *Id.* at 10–11. Appellee argued that investing part of the funds in cryptocurrency constitutes a breach of fiduciary duty. *Id.* Appellee sought an order to compel Appellant to reimburse the plan for all the money lost from the investments. *Id.*

During proceedings Appellant successfully motioned to strike the jury claiming that most circuits hold ERISA claims carry no jury trial right. *Id.* at 7. Appellant showed ERISA does not grant the right to a jury trial and so a jury trial can only be granted by the Seventh Amendment. *Id.* at 15–16. Appellant explained that the Seventh Amendment applies to legal claims not equitable claims. *Id.* Appellant argued that Appellee's claim is equitable because he seeks reimbursement for the plan, not damages, and the claim is rooted in trust law, which were traditionally handled by equity courts. *Id.*

In the trial court's motion striking the jury trial, the court conducted a two-part inquiry into the claim and the remedy sought to determine if the suit is entitled to a jury trial. *Id.* at 19–21. The court found the ERISA claim and remedy to be equitable and so held Appellee's claim is

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not entitled to a jury trial. *Id.* Appellee appealed the trial court's motion striking the jury trial. *Id.* at 23.

SUMMARY OF THE ARGUMENT

ERISA claims are not entitled to a jury trial because no such right is listed in the statute and the claims are not granted the right by the Seventh Amendment. This court must look at the comparable common law actions and the remedy sought to determine if a suit is legal or equitable in nature. If both these factors are equitable then this court should hold the suit is equitable and ERISA claims do not get a jury trial. This court must affirm the district court's motion striking the jury trial.

STANDARD OF REVIEW

Circuit Court and Supreme Court decisions recognize for that appellate review using the abuse of discretion standard "is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice." *Gasperini v. Ctr. for Humans, Inc.*, 518 U.S. 415, 435 (1996).

II. THE DISTRICT COURT DID NOT ERR IN ITS MOTION TO STRIKE A JURY TRIAL BECAUSE THE ERISA §502(A)(2) CLAIM AND REMEDY ARE EQUITABLE AND THUS NOT ENTITLED TO A JURY TRIAL.

A plaintiff bringing an ERISA §502(a)(2) claim does not have the right to a jury trial when the nature of the action and remedy sought are equitable in nature. ERISA §502(a)(2) allows for participants and beneficiaries of a plan to bring a suit for breach of fiduciary duty to recover appropriate relief. 29 U.S.C. § 1132(a)(2) (2018). ERISA does not provide plaintiffs a statutory right to a jury trial. But the Seventh Amendment to the United State Constitution provides the right to a jury trial "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. However, this right to a jury trial does not

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extend to all causes of actions. The Supreme Court has repeatedly held that the right to a jury trial does not extend to suits involving only equitable rights and remedies.

The Fourteenth Circuit Court of Appeals should affirm the district court’s motion striking a jury trial. The Court should require the plaintiff to bring forth a legal cause of action to assert his jury trial right. First, the court should follow precedent and the majority of Circuits that hold ERISA claims are equitable and not entitled to a jury trial. Second, the Court should hold that the plaintiff’s action is equitable in nature because the restitution action is equitable and ERISA breach of duty claims are rooted in trust law, which is in the realm of equity. Lastly, the Court should hold that the remedy sought by the plaintiff is equitable because plaintiff seeks only to be reimbursed for the amount owed under the plan.

A. Supreme Court Precedent and the Majority of Circuits Hold that ERISA Claims are Equitable and not Entitled to a Jury Trial.

Since the merger of the courts of law and equity, the Supreme Court has historically interpreted the phrase “suits at common law” as referring “‘to suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.’” *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564–65 (1990) (quoting *Parsons v. Bedford*, 28 U.S. 433, 446–47 (1830)).

In 2002, in *Great-W. Life & Annuity Ins. Co. v. Knudson* the Supreme Court held that ERISA §502(a)(3) claims are not within the scope of the Seventh Amendment right to a jury trial, because under the statute such claims only allow for equitable relief. 534 U.S. 204, 213 (2002). In the aftermath of *Knudson*, it was unclear whether §502(a)(2) claims are also considered equitable and likewise not afforded the right to a jury trial. Specifically, because §502(a)(2) provides individuals the right to sue for relief on behalf of the plan, while §502(a)(3)

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provides the right to sue for equitable remedy on their own behalf. 29 U.S.C. § 1132(a). The Supreme Court has not ruled on whether the nature and remedy in §502(a)(2) claims are equitable or legal.

Since *Knudson*, the majority of courts hold that no right to a jury trial exists for plaintiffs bringing ERISA claims because the action and remedy available are equitable in nature. In *O'Hara v. Nat'l Union Fire Ins. Co. of Pitt.* the Second Circuit held “there is no right to a jury trial in a suit brought to recover ERISA benefits.” 642 F.3d 110, 116 (2d Cir. 2011). Likewise, the Sixth Circuit in *Reese v. CNH Am. LLC* held “the Seventh Amendment does not guarantee a jury trial in ERISA . . . cases because the relief is equitable rather than legal.” 574 F.3d 315, 327 (6th Cir. 2009). Additionally, in *Mathews v. Sears Pension Plan* the Seventh Circuit stated, “there is no right to a jury trial in an ERISA case . . . [because] ERISA's antecedents are equitable.” 144 F.3d 461, 468 (7th Cir. 1998). Lastly, the Fifth Circuit has also held “ERISA claims do not entitle a plaintiff to a jury trial.” *Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994).

As can be seen by the case law from other circuits the issue of whether ERISA claims are equitable or legal and thus entitled to a jury trial is an already settled matter. If this Court should decide to go against this precedent, it would risk creating disparate results and treatment in the judiciary. Upsetting a major tenant of the judicial system to ensure fair and equal treatment throughout the country. Thus, since the claim before the court emerges from ERISA the court should hold as a preliminary matter that the Plaintiff is not entitled to a jury trial to ensure the fair treatment across the circuits and the court system.

B. The Nature of the Plaintiff’s Action is Equitable Because the Comparable 18th Century Common Law Actions were Handled by Courts of Equity.

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Even if this Court is reluctant to follow the majority that holds ERISA claims are not entitled to a jury trial as a preliminary matter, a closer inquiry into this specific matter will prove the district court did not err in its motion to strike the jury trial. When a federal statute does not explicitly provide for the right to a jury trial under the Seventh Amendment, as is the case with ERISA, courts engage in a two-step inquiry. *Terry*, 494 U.S. at 564–65.

Since the right to a jury trial applies only to actions that are legal in nature not equitable, this inquiry, as outlined in *Tull v. United States*, is to determine if the case is more akin to those cases tried in courts of law or cases tried in courts of equity. 481 U.S. 412, 417–18 (1987). First, the court must “compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity.” *Id.* Second, the court must examine “the remedy sought and determine whether it is legal or equitable in nature.” *Id.* If both these prongs lean in favor of equity, then the plaintiff is not entitled to a jury trial. *Id.*

1. The plaintiff’s action for restitution is comparable to common law restitution in equity, which would not provide the plaintiff the right to a jury trial.

When conducting its inquiry into the first step the district court correctly concluded that the comparable common law claim was equitable restitution. In its motion to strike the jury trial the district court held that the plaintiff was not entitled to a jury trial because nature of the plaintiff’s claim is equitable in nature not legal due to its similarity to common law restitution in equity. The first step of the inquiry compares the present-day cause of action to the similar action at common law. *Terry*, 494 U.S. at 564–66. Specifically, this inquiry compares the rights at issue and the nature of the suit. *Id.* In these cases, the court will look at the analogous common law actions to determine which one best fits the case at hand. *Tull*, 481 U.S. at 417. Thus, if the claim is similar to common law restitution in equity, then district court did not err in its motion to strike the jury trial.

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For courts to determine whether restitution is legal or equitable they must look at the “the basis for the plaintiff’s claim and the nature of the underlying remedies sought.” *Knudson*, 534 U.S. at 213–14 (2002). Restitution at law occurs whenever “[a] plaintiff [can’t] assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him.” *Id.* While for restitution in equity the plaintiff “must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant’s possession.” *Id.* at 214–16.

In the case *Great-W. Life & Annuity Ins. Co. v. Knudson*, the Supreme Court looked to see if a plaintiff’s §502(a)(3) claim for restitution was equitable or legal. *Id.* at 210–14. Knudson had been in a car wreck and suffered injuries requiring serious medical treatment. *Id.* at 207. At the time the Knudson was covered by her husband’s employer’s health plan which paid for about eighty percent of the medical expenses. *Id.* at 207–08. The remaining twenty percent was to be paid an insurance company. *Id.* The plan also included a reimbursement provision that allowed the insurance company to bring suit to recover for any money that the beneficiary was able to recover from a third party. *Id.* at 208–09. After Knudson reach a successful settlement in a state-court tort action against a third-party car manufacturer. *Id.* The insurance company suit against Knudson seeking restitution for the funds she recovered from the car manufacturer. *Id.*

The insurance company was claiming restitution in equity, however the Supreme Court concluded that the restitution the insurance company was seeking was in fact restitution at law. *Id.* at 212. When evaluating the company’s claim the Supreme Court concluded that the basis of their claim was not that Knudson held funds belonging to the insurance company. *Id.* at 214–15. Instead, the Court found that the claim was based around the belief that the company was

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contractually entitled to some of the funds Knudson received for the benefits it had conferred. *Id.* Therefore, the Court held the insurance's company's action was restitution at law not in equity because it did not seek "the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon respondents." *Id.*

Here the kind of restitution the plaintiff seeks is restitution in equity because he is seeking an action to enjoin action in some property which he has a right to possession. This action is unlike the insurance company's suit in *Knudson*, which sought to recover funds that they had not title or right to possession. The plaintiff in the case at hand is seeking restitution in equity because the money sought can be traced to a constructive trust in the form of his retirement account set up and managed by Howard and Big-Box. The plaintiff's restitution claim revolves around the funds from the retirement account, which the plaintiff has a possessory right to.

Additionally, as the district court correctly noted in its motion striking a jury trial plaintiff's is not seeking funds in the form of punitive damages. Rather he is merely seeking that his retirement account is restored to the condition and amount it was at before the money was lost. Again, this is different from *Knudson* which saw the plaintiff seeking to recover for monetary damages. In *Knudson* the action was restitution at law because the company sought legal relief through the imposition of liability. However, here the plaintiff's claim seeks to reimburse the account by requiring action by the Defendants. Therefore, in the case at hand nature of the claim more closely resembles restitution in equity because it is seeking to restore the funds to plaintiff. The plaintiff does not want to impose liability on the Defendants. Since his action is similar to the common law claim of restitution in equity, he is not entitled to a jury trial.

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Thus, the district court was correct in its inquiry into the first step because it ruled that the nature of the plaintiff's ERISA claim was equitable and did not entitle the plaintiff to a jury trial.

2. A comparable common law action is breach for fiduciary duty under trust law, which was handled by courts of equity and not afforded a jury trial.

Not only is the nature plaintiff's action equitable because it is similar to restitution in equity but ERISA's roots in the common law of trust also cause ERISA claims to be equitable. The Supreme Court has long acknowledged that trust common law provides the foundation for ERISA. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110–11 (1989). At common law actions involving a trustee's breach of fiduciary duty were equitable actions and tried in courts of equity and so were not provided with the right to a jury trial. *Id.* Thus, if the plaintiff's action for breach of fiduciary duty is similar to the common law trustee's breach of duty action then the plaintiff is not entitled to a jury trial.

In *Mertens v. Hewitt Assocs.* the Supreme Court considered the nature of ERISA §502(a)(3) claims. 508 U.S. 248, 252–53 (1993). In *Mertens*, the plaintiffs were the employees of the defendant's steel plant. *Id.* at 250–52. The plaintiffs had been part of the defendant's pension plan but due to changes in the business, the plan became underfunded and was terminated causing the plaintiffs to only receive their ERISA benefits not their larger pensions from the plan. *Id.* The plaintiffs sued for a breach of fiduciary duties alleging that the defendant had breached its duty by allowing the plan to fail and failing to disclose its shortcomings. *Id.*

When examining whether the plaintiffs' actions were legal or equitable the Supreme Court turned to the historical roots of ERISA. *Id.* at 255–56. The Court found that the common law of trusts served as the basis for much of ERISA. *Id.* Reasoning that a beneficiary's interest in bringing an ERISA §502 claim for breach of duty is similar to the interest of a trust beneficiary bringing an action of breach of duty against a trustee. *Id.* At common law the courts of equity

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held exclusive jurisdiction over actions regarding trusts. *Id.* at 255–62. The Court applying this to ERISA found that since in the courts of equity actions involving a trust could only afford a plaintiff equitable relief, the suits brought under ERISA are equitable in nature and can only be afforded equitable remedy. *Id.* The Court held that since trust common law is basis for ERISA it makes ERISA claims equitable and only allows for equitable relief not for legal remedy. *Id.* at 260–63. Additionally, the Court found that this idea is within the congressional purpose of ERISA §502, which is to protect plan participants and beneficiaries. *Id.*

The trust common law principles that the *Mertens* Court held made up the basis of the ERISA claim are also serve as the root of the ERISA claim in the present case. Even though this case revolves around §502(a)(2) rather than §502(a)(3) the trust common law roots that the *Mertens* Court believed formed the foundation for such ERISA claims still apply to this case. Even though §502(a)(2) allows plaintiffs to sue for damages or equitable relief with respect to a plan unlike §502(a)(3), which allows for individual relief limited to equitable relief, the claims are still rooted in breaches of fiduciary duty. Thus, the right at issue and the nature of the action are analogous to trust suits and are equitable in nature.

Additionally, the retirement account set up and managed by the defendant for the plaintiff shares many similarities with a common law trust. The plaintiff's retirement account essentially operates as a constructive trust with Howard as the manager. Just like *Mertens* the present case revolves around a perceived breach of duty for a constructive trust. In *Mertens* the plaintiffs were claiming that the defendant mismanaged pension account was a breach of duty. While in the case at hand the plaintiff is claiming that the defendant's poor investment choices amounted to a breach of duty. Both these cases resemble common law trust actions because the retirement account operate as constructive trust, with the defendants operating as a trustee. Since at

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common law actions for a breach of duty against a trustee were handled by courts of equity, ERISA claims for breach of duty are equitable because trust common law serves as the basis for these claims. Therefore, the district court did not err in its motion striking the jury trial because the analogous common law action is equitable, so the plaintiff's claim is equitable.

C. The Nature of the Relief Sought is Equitable not Legal and thus does not Afford the Plaintiff the Right to a Jury Trial.

Moving onto the second step of the inquiry, the district court correctly concluded that remedy sought is equitable and thus is not entitled to a trial by jury. After examining the similar common law action for the nature of a plaintiff's claim the court turns to the second step of the inquiry. *Terry*, 494 U.S. at 564–66. In this second step, which courts regard as the more important of the two, the court must examine the remedy sought to determine if it is legal or equitable. *Id.* ERISA §502(a)(2) allows for relief in the form of restoring to the plan any losses or profits the fiduciary may have caused and other forms of equitable and remedial relief the court may deem necessary. 29 U.S.C. § 1132(a)(2). Thus, if the relief the plaintiff seeks under ERISA §502(a)(2) is equitable then he is not entitled to a jury trial.

There is no clear test for determining if the remedy sought is equitable or legal in nature. Most courts hold money damages are a form of legal relief because they were traditionally offered in courts of law, however, just because relief is monetary doesn't necessarily mean it is legal relief. *Terry*, 494 U.S. at 570–71. When monetary damages are awarded incidental or in conjunction with injunctive relief, they may be equitable. *Tull v. United States*, 481 U.S. 412, 423–25 (1987). While equitable relief is relief that was traditionally offered in the courts of equity. *CIGNA Corp. v. Amara*, 563 U.S. 421, 439–40 (2011). The Supreme Court has stated that “[e]quitable’ relief must mean something less than all relief,” believing that equitable reliefs are

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those that were offered in equity. *Knudson*, 534 U.S. at 213 (2002) (quoting *Mertens*, 508 U.S. at 259 n.8 (1993)).

In the case *Mass. Mut. Life Ins. Co. v. Russell*, the Supreme Court examined the form of relief appropriate under ERISA §409, which ERISA §502(a)(2) allows for the civil action for relief under. 473 U.S. 134, 140–41 (1985); 29 U.S.C. § 1132(a)(2). In *Russell* the plaintiffs brought a breach of duty action against their employer for improper and poor management of their benefits plan. *Russell*, 473 U.S. at 136–38. Bringing their action under ERISA §409, the remedy the plaintiffs sought were either extra-contractual compensatory or punitive damages. *Id.* The Ninth Circuit held for the plaintiffs finding that §409 authorizes recovery of extracontractual damages because the statute allows for “remedial relief as the court may deem appropriate.” *Id.* (quoting 29 U.S.C. § 1109(a)). The Supreme Court reversed, holding §409 does not allow for extra-contractual or punitive damages. *Id.* at 148. The Court reached this conclusion after determining that §409 did not provide for individual relief, but instead §409 limited relief for the plan, which the Court characterized as equitable relief. *Id.* at 141–44. Moreover, the Court examined the legislative history and found it was not Congress’s intent that the phrase “remedial relief as the court may deem appropriate” include contractual or punitive damages. *Id.* at 145–48 (quoting 29 U.S.C. § 1109(a)).

Later in *CIGNA Corp. v. Amara*, the Supreme Court considered the situation where monetary and equitable relief are intertwined. 563 U.S. at 439. In that case retiring employees sued their employer for converting their benefit plan from a pension plan to a cash balance. *Id.* at 424–29. The employees sought equitable relief to get the court to reform the plan and return the benefit that the employees had previously held. *Id.* The Court found that equitable relief meant relief which was traditionally offered in courts of equity. *Id.* at 439–40. The Court found that the

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power to reform a plan, is one that historically has been given to equity courts because they could reform contract terms. *Id.* at 440–42. The Court stated that even though the reformation of the plan would cause the plaintiffs to be granted monetary remedy this did not take the relief out of the realm of equity. *Id.* The Court held that monetary compensation for loss from a breach of duty of this kind is equitable and based in common law of trusts used in equity courts. *Id.*

Here the relief the plaintiff seeks is equitable because he does not seek to recover contractual or punitive damages only to recover the benefits owed under the plan. As outlined in *Russell*, a plaintiff cannot be granted contractual or punitive damages under ERISA §502(a)(2). Similarly, the plaintiff here is simply seeking reimbursement for the money that was lost from his retirement account. This form of relief is unlike the legal remedies sought in *Russell* and more like the equitable relief outline in the statute. Thus, the relief sought in this case is equitable because it seeks to restore the account to its prior position.

Moreover, the fact that this equitable relief may take the form of monetary compensation to reimburse the plaintiff's retirement account has no bearing on the equitable nature of the relief sought. As shown *Amara*, monetary compensation can still be equitable. Here the monetary compensation is like that seen in *Amara*, which saw compensation for changes made to a plan's structure. In this case the monetary compensation is to help restore funds that the plaintiff lost through the mismanagement of the account. In both cases the funds are used to help return the plaintiff's accounts to the position they would have been prior to the incident.

Additionally, the type of reimbursement sought in this case is a type of equitable relief that was traditionally offered in courts of equity. As *Amara* discussed monetary remedy was often administered at common law in trust actions for breaches of fiduciary duty. Here the retirement account essentially operates as a constructive trust with managed by the Defendant.

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Therefore, the same equitable remedies that were administrable at common law are administrable in this case. Since the nature of the relief sought is equitable the plaintiff is not entitled to a jury trial and so the district court did not err in its motion to strike the jury trial.

The inquiry into the two-step test of the nature of the action and the remedy sought proves that the plaintiff's ERISA case is equitable in nature and remedy, so it is not entitled to a jury trial. This finding is in line with the majority of Circuits that hold ERISA claims are not entitled to a jury trial under the Seventh amendment because they are equitable. Thus, this Court should hold that the district court did not err in its motion to strike a jury trial and affirm the ruling.

CONCLUSION

This court should affirm the district court motion striking the jury trial because the Seventh Amendment does not apply to ERISA because it is an equitable statute.

Applicant Details

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Applicant Education

BA/BS From	Harding University
Date of BA/BS	May 2016
JD/LLB From	Northwestern University School of Law
	http://www.law.northwestern.edu/
Date of JD/LLB	May 5, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Northwestern Law Journal of Human Rights
Moot Court Experience	Yes
Moot Court Name(s)	William E. McGee National Civil Rights

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 4, 2023

The Honorable Jamar Walker
U.S. District Court, Eastern District of Virginia
Norfolk, VA

Dear Judge Walker,

I hope this letter finds you well and in good health. I am honored to submit my application for a clerkship within your chambers for the 2024-2025 term. I am a rising 3L student at Northwestern Pritzker School of Law, eager to join your chambers and immerse myself in the intricacies of the law, under your guidance and expertise. I am certain that a clerkship in your chambers would critically shape my understanding of the judicial process and instill in me the highest standards of professionalism and ethics.

In addition to my deep enthusiasm for the clerkship opportunity, I believe my academic experiences at Northwestern have equipped me with a strong foundation to excel in the role. In preparation for a possible clerkship I have immersed myself in a rigorous curriculum, specifically honing my analytical and research skills through the university's Appellate Concentration including coursework focused on litigation, judicial writing, and advocacy. I have also had the privilege of working on a diverse range of projects directly applicable to clerking, including the McGee Civil Rights Moot Court and the MacArthur Justice civil rights litigation clinic, which have sharpened my ability to think critically and communicate effectively in a legal context. Moreover, my involvement with Northwestern's Journal of Human Rights and the Moot Court Society has allowed me to develop leadership skills, work collaboratively with peers on legal research and analysis, and navigate complex challenges with resilience and determination. I am confident that these experiences, combined with my passion for the law and dedication to excellence, will enable me to contribute meaningfully to the work of your chambers and thrive in the demanding and intellectually stimulating environment of a clerkship.

My application includes a resume, law transcript, and writing sample, which is an opinion I wrote as an assignment in "Legal Writing for the Courts." Letters of recommendation are provided from:

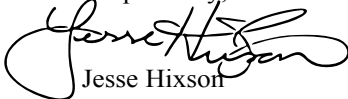
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I would welcome the opportunity to interview with you to further discuss my qualifications and interest in the position. Thank you for considering my application.

Respectfully,



Jesse Hixson

JESSE HIXSON

215 E. Chestnut St., Apt 704, Chicago, IL 60611 • jesse.hixson@law.northwestern.edu • 615-542-5349

EDUCATION

Northwestern Pritzker School of Law, Chicago, IL

Candidate for Juris Doctor, May 2024, GPA: 3.769

- Journal of Human Rights – Deputy Editor-in-Chief
- Moot Court Society – Spring Competitions Director
- MacArthur Justice Center’s Civil Rights Litigation Clinic
- William E. McGee National Civil Rights Moot Court Competition
- ACLU – Vice President of Events
- OUTLaw – Member

Arizona State University, Tempe, AZ

Master of Fine Arts in Arts Entrepreneurship and Management, May 2019

Certificate in Nonprofit Leadership and Management, December 2018

- Nu Lambda Mu Nonprofit Honors Society

Harding University, Searcy, AR

Bachelor of Arts in Interdisciplinary Studies, May 2016

- Summa Cum Laude, President's Award, Honors Graduate with Distinction, Honors Scholar
- The Bison Student Newspaper – Business Manager and Reporter
- Omicron Delta Kappa Leadership Society – Member
- Best Advertiser – Southeastern Journalism Conference

EXPERIENCE

Allen & Overy, New York, NY

Summer Associate, May 2023 – July 2023

U.S. Department of Justice – Detroit Immigration Court, Detroit, MI

Legal Intern, June 2022 – August 2022

- Wrote judicial opinions and decisions on various applications for relief before the Court (*samples available*)
- Researched new and emerging immigration issues for the Immigration Judges
- Observed numerous merit hearings and discussed and analyzed cases with the Immigration Judges

Disney Theatrical Group, New York, NY

Executive Assistant, Domestic Tours and Regional Engagements, July 2019 – January 2021

- Managed and processed \$10 million of invoices per year
- Coordinated travel and managed expenses for three executives and Broadway talent
- Sourced, ordered, and maintained stock of promotional merchandise for Disney’s touring shows
- Tracked marketing accounts payable and receivable for three national tours

Arizona State University, Tempe, AZ

Faculty Associate, August 2019 – May 2020

- Taught an upper-level section of Management in the Arts
- Gave an introduction into the legal, political, and economic landscape of arts and nonprofits in the United States

Artivate: A Journal of Arts Entrepreneurship, Fayetteville, AR

Editorial Assistant, July 2017 – May 2020

- Copy-edited and typeset two nationally circulated 80-page editions each year
- Managed the layout and style of the journal as well as workflow and communication between authors and editors

ADDITIONAL INFORMATION

Volunteer Activities: Vote Forward (Letter Writer), Crisis Text Line (Counselor), Detour Theatre Company (Assistant Organizational Consultant), The Panama Project (Fundraiser)

Interests: Violinist, Traveling to National Parks, Armchair theology, Pastry baking, Broadway Producing

THE NAME OF THE UNIVERSITY IS PRINTED IN WHITE
ACROSS THE FACE OF THE ENTIRE TRANSCRIPT

A BLACK AND WHITE TRANSCRIPT IS NOT OFFICIAL

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: Hixson, Jesse
Student ID: 3338611

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School of Law Official Transcript

Print Date: 06/09/2023
Staff Member, Journal of Human Rights (2022-23)

Academic Program History

Program: Juris Doctor
07/28/2021: Active in Program

Beginning of Law Record

2021 Fall (08/30/2021 - 12/16/2021)

Course	Description	Attempted	Earned	Grade	Points
BUSCOM 510	Contracts	3.000	3.000	A	12.000
Instructor:	Jide Nzelibe				
CRIM 520	Criminal Law	3.000	3.000	A-	11.010
Instructor:	Meredith Rountree				
LAWSTUDY 540	Communication & Legal Reasoning	2.000	2.000	A	8.000
Instructor:	Rebekah Holman				
LITARB 530	Civil Procedure	3.000	3.000	A-	11.010
Instructor:	Zachary Clopton				
PPTYTORT 550	Torts	3.000	3.000	A-	11.010
Instructor:	Ezra Friedman				

Term Honor: Dean's List

Term GPA	3.788	Term Totals	14.000	14.000	14.000	53.030
Cum GPA	3.788	Cum Totals	14.000	14.000	14.000	53.030

2022 Spring (01/10/2022 - 05/05/2022)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 500	Constitutional Law	3.000	3.000	A	12.000
Instructor:	Erin Delaney				
CONPUB 610	First Amendment	3.000	3.000	A	12.000
Instructor:	Jason DeSanto				
CONPUB 644	Legislation	3.000	3.000	A-	11.010
Instructor:	Ellen Mulaney				
LAWSTUDY 541	Communication & Legal Reasoning	2.000	2.000	B+	6.660
Instructor:	Rebekah Holman				
PPTYTORT 530	Property	3.000	3.000	B+	9.990
Instructor:	Peter DiCola				

Term Honor: Dean's List

Term GPA	3.690	Term Totals	14.000	14.000	14.000	51.660
Cum GPA	3.739	Cum Totals	28.000	28.000	28.000	104.690

2022 Fall (08/29/2022 - 12/15/2022)

Course	Description	Attempted	Earned	Grade	Points
LITARB 605	Trial Advocacy ITA	4.000	4.000	A-	14.680
Instructor:	Joshua Jones				
LITARB 606	Evidence (ITA)	3.000	3.000	B+	9.990
Instructor:	Joshua Jones				
LITARB 607	Legal Ethics (ITA)	3.000	3.000	A	12.000
Instructor:	Wendy Muchman				
LITARB 621	Appellate Advocacy	3.000	3.000	A-	11.010
Instructor:	Meredith Rountree				
LITARB 721	Clinic: Civil Rights Litigation	4.000	4.000	A	16.000
Instructor:	David Shapiro				
	Vanessa del Valle				
	Alexa Van Brunt				

Term Honor: Dean's List

			Attempted	Earned	GPA Units	Points
Term GPA	3.746	Term Totals	17.000	17.000	17.000	63.680
Cum GPA	3.742	Cum Totals	45.000	45.000	45.000	168.370

2023 Spring (01/09/2023 - 05/04/2023)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 600	Administrative Law	3.000	3.000	A-	11.010
Instructor:	James Speta				
CONPUB 755	Global Freedom of Expression	2.000	2.000	A	8.000
Instructor:	Doreen Weisenhaus				
CRIM 610	Constitutional Crim Procedure	3.000	3.000	A-	11.010
Instructor:	Meredith Rountree				
LAWSTUDY 615	Law and Rhetoric	2.000	2.000	A	8.000
Instructor:	James Lupo				
LAWSTUDY 628	Writing for the Court	2.000	2.000	A	8.000
Instructor:	Janet Brown				
LITARB 608	Litigation, Crises & Strat Comm	2.000	2.000	A	8.000
Instructor:	Harian Loeb				

Term Honor: Dean's List

			Attempted	Earned	GPA Units	Points
Term GPA	3.859	Term Totals	14.000	14.000	14.000	54.020
Cum GPA	3.769	Cum Totals	59.000	59.000	59.000	222.390

End of School of Law Official Transcript

NORTHWESTERN UNIVERSITY PRITZKER SCHOOL OF LAW

EXPLANATORY LEGEND PRINTED ON BACK

BROWN STAINS INDICATE UNAUTHORIZED ALTERATIONS

Becky McAlister, Registrar

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing this letter in enthusiastic support of the application of Jesse Hixson for a judicial clerkship. I came to know Jesse over the past year, first as an exceptional high-achieving student in my course, Global Freedom of Expression and the Press, and then through our many substantive conversations outside the classroom. He impressed me with his intelligence, curiosity, and passion for learning.

My course examines how courts, legislatures, and policymakers around the world grapple with new and troubling issues in expression and press freedom in a highly digitized era. Its main assessment – a major paper – demands that students analyze some of the most difficult and novel legal questions in jurisprudence today. Utilizing extensive research, analytical, and writing skills, Jesse produced a comprehensive examination of the state of SLAPP suits and legislation in the US, concluding that the mix and match of state laws has resulted in the widespread extortion and suppression of press organizations, journalists and activists. The highly persuasive paper proposed a federal anti-SLAPP law with provisions to allow plaintiffs to seek wide ranging subpoenas on non-party actors and additional damages. His clear, concise, and cogent paper was among the best of this course, and further evidence of his academic accomplishments, which also include his role as Deputy Editor-in-chief of the Journal of Human Rights and his work for the MacArthur Justice Center Civil Rights Litigation Clinic.

Scholarship aside, Jesse is very personable, mature, and energetic – qualities reflected in the leadership role he assumed in classroom discussions that engaged and inspired other students to participate. His dedication and hard work, as also illustrated by his previous achievements as a legal intern for the Detroit Immigration Court and at the Disney Theatrical Group, are fundamental to his success.

As a law academic with several leading books on global media law and policy, as a former prosecutor, and as a former legal editor and city editor of The New York Times, I have known many law students and young lawyers. I have no doubt that Jesse will be an exceptional law clerk in whatever chambers he works for and an outstanding attorney. It is my honor and pleasure to recommend him.

Respectfully,

Doreen Weisenhaus
Senior Lecturer
Northwestern Pritzker School of Law
Senior Lecturer and Director, Media Law and Policy Initiative
Medill School of Journalism, Media, Integrated Marketing Communications

Doreen Weisenhaus - doreen.weisenhaus@law.northwestern.edu - (312) 503-7810



U.S. Department of Justice

Executive Office for Immigration Review

Immigration Court

April 10, 2023

*P.V. McNamara Federal Building
477 Michigan Avenue, Suite 440
Detroit, Michigan 48226*

To Whom It May Concern:

Jesse Hixson assisted me with cases as a Legal Intern with the Detroit Immigration Court in the summer of 2022. Given his qualifications, I had been expecting someone with excellent research and writing skills, but Jesse exceeded my expectations in his level of judgment, sophistication, and maturity about the emerging legal and factual issues attendant in cases that arise from ongoing political, social and economic strife around the world. His questions, his observations and our discussions regarding cases all reflected careful and caring insight about each case. It can be easy to characterize cases in a generic manner and excessively rely on templates to generate written decisions, but I did not see that in Jesse's work.

Aside from his work, Jesse was an extremely positive and team-oriented person, who related well to everyone. I would describe him as a quick study, who got his work done efficiently and by requested due dates. He was observant of rules, procedures, and security measures.

I would love to see Jesse back at the Immigration Court, but I suspect he has greater legal roles ahead of him. I would be happy to speak with you further about Jesse's work at the Court – best is my cell (248) 229-5977.

Sincerely,

A handwritten signature in blue ink, reading "Jennifer M. Gorland".

Jennifer M. Gorland
Immigration Judge

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to recommend Jesse Hixson to you. I taught Mr. Hixson criminal law during the Fall of his 1L year. This Fall, he was in my Appellate Advocacy class, and this Spring, he enrolled in my Constitutional Criminal Procedure class, which surveys the constitutional regulation of the police via the Fourth, Fifth, and Sixth Amendments. He earned an A- in each class. Each class was very competitive and these grades reflect his excellent work.

Starting in the fall of his first year, Mr. Hixson made strong contributions to classroom discussions. In both doctrinal classes, he demonstrated a thoughtful understanding of the material. It was in Appellate Advocacy, however, where I was able to work most closely with him. This is a small, writing-intensive simulation course where students research a pair of legal issues, draft an appellate brief, and present oral argument. Mr. Hixson's class worked with a lightly edited transcript of a suppression hearing that required the students to research Texas law interpreting *Pennsylvania v. Muniz* and apply Texas law regarding knowing, voluntary, and intelligent waivers.

In the Appellate Advocacy class, Mr. Hixson demonstrated he is a very strong writer and oral advocate. In addition, in the class discussions regarding how to argue the different legal points and address cases seemingly adverse to either the appellant or appellee position, Mr. Hixson's contributions were uniformly outstanding. He quickly mastered the appellate record in the case and was the first to catch some crucial details – in this case, discrepancies in the testimony regarding the questions asked of the defendant when he was booked into jail. In addition, he reads cases in a sophisticated way. In our discussions, his comments reflected how he appreciated both the nuance in the cases, as well as how they fit into the larger trends in the caselaw.

If you have any questions about Mr. Hixson, please do not hesitate to contact me. I believe he would be an outstanding addition to your chambers.

Respectfully,

Meredith Martin Rountree
Senior Lecturer
Northwestern Pritzker School of Law

Meredith Rountree - meredith.rountree@law.northwestern.edu - (312) 503-0227

JESSE M. HIXSON

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Writing Sample

This writing sample is a judicial opinion that I wrote as an assignment in “Legal Writing for the Court” at Northwestern Law. The professor has approved my using this document as a sample of my writing. The opinion decides an appeal that raises several evidentiary and procedural issues. This sample has received no outside editing.

In the
United States Court of Appeals
For the Seventh Circuit

No. 22-2067

KAREN HIRLSTON,

Plaintiff-Appellant,

v.

COSTCO WHOLESALE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana.
No. 1:17-cv-04699-TWP – **Tanya Walton Pratt, Judge.**

ARGUED FEBRUARY 7, 2023 – DECIDED APRIL 4, 2023

Before HAMILTON, BRENNAN, JACKSON-AKIWUMI, *Circuit Judges*

HAMILTON, *Circuit Judge*. The case before us arises out of an employment discrimination suit by Karen Hirlston, against her former employer, wholesale retail giant, Costco. On appeal, rather than relitigating any of the substantive discrimination and retaliation claims she originally brought against Costco, Hirlston instead

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alleges several evidentiary and procedural errors made by the district court that she believes misled the jury, affected her substantial rights, and resulted in verdicts in favor of Costco. The judicial errors Hirlston complains of primarily fall into two categories: jury instructions and evidentiary rulings.

Hirlston first argues that the district court's Jury Instruction 19 and special verdict form (specifically Question 1) contained phrasing that misstated the relevant employment discrimination laws, confusing the jury and misleading them to find in favor of Costco on her discrimination claim. Hirlston further asserts that she was not given an opportunity to object to the erroneous wording included in either the instructions or special verdict form before they were presented to the jury. Hirlston next argues that the district court erred by admitting into evidence two photographs of her Costco workstation as they were not introduced by Costco until after the close of discovery and they were admitted without proper foundation.

After the jury found for Costco on her discrimination claims, the court subsequently found for Costco on Hirlston's retaliation claims. Hirlston alleges the aforementioned errors necessarily resulted in an adverse ruling by the district court on her retaliation claim as the court's decision was tainted by the errors and predicated on a faulty jury finding. We disagree and affirm the district court's ruling in full.

I. Background

In December 2017, Karen Hirlston brought suit against her employer, Costco, where she worked as a manager in the store's Optical Department. In the suit, Hirlston alleged that Costco, in violation of the Americans with Disabilities Act (ADA), had discriminated against her by failing to provide her with reasonable accommodations and that they then retaliated against her for

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requesting accommodations. A jury heard Hirlston's discrimination claims while the district court alone ruled on her retaliation claim. At the conclusion of the trial, the jury returned a verdict in Costco's favor on the discrimination claims which subsequently led to the district court also finding in favor of Costco on the retaliation claim. Following the verdicts, Hirlston filed a motion with the district court for a new trial under Rules 59 and 60 of the Federal Rules of Civil Procedure. The district court denied her motion for a new trial. Hirlston now appeals both verdicts and the denial of a new trial to this Court.

During the trial, *both* parties attempted to introduce photographic evidence into the record that had not previously been disclosed to the other side during discovery. Hirlston introduced three photographs of the Optical Department from different angles which Costco objected to on lack of foundation grounds. The district court overruled Costco and allowed the photos to be introduced. Costco then introduced two photographs of the Optical Department desks and cubbies from different angles which Hirlston first objected to for being untimely according to the court's trial order. Hirlston argued that the trial order stated both parties should submit their demonstrative exhibits by June 4. The court overruled Hirlston's objection regarding timeliness, stating that she misunderstood the court's trial order which was only a deadline for demonstratives to be used during opening statement. Appellee Br. 20; App. 213. Hirlston raised a second objection to the photos on lack of foundation grounds. *Id.* The district court overruled Hirlston's foundational objection and admitted Costco's photographs into evidence. *Id.*

At the close of trial, the court discussed with the parties the jury instructions that were proposed by both sides. On Jury Instruction 19, which defined the word "qualified," both parties submitted substantially similar instructions. The only difference between the

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two was in the last sentence of the instruction. Hirlston's instruction ended with the phrase "with or without the accommodations she proposed of a grabber, a chair with a back, and periodic lifting assistance." Appellee Br. 21. Costco's instruction ended with the phrase "with or without a reasonable accommodation." To utilize the language of both sides, the court proposed combining the sentences to read "with or without the accommodations she proposed at the November 15 job assessment meeting." *Id.* at 22. At the court's proposal, Hirlston objected, stating that she had reconsidered her position and now preferred Costco's original instruction, excluding "she proposed..." Costco did not object to Hirlston's request as this was in line with their original proposition.

After this discussion, the court emailed both parties a final version of the jury instructions to review. The court gave both parties a 33-minute recess to review the instructions, Appellee Suppl. App. 219. The instructions emailed to the parties included the Court's proposed Instruction 19 which read "with or without the reasonable accommodations she proposed," Appellee Br. 23. When it reconvened, the court asked both parties if they had had a chance to review the instructions, to which Hirlston replied she was reviewing Instruction 19. *Id.* The court responded by orally stating to both parties that it had "only" removed from Jury Instruction 19 the phrase "at the November 15 job assessment meeting." *Id.* at 24. Hirlston did not object to Instruction 19 but objected to a number of the other final instructions.

Also at the close of trial, the court discussed with the parties their proposed jury verdict forms. Both parties proposed different language on Question 1 of the verdict form. The court noted that it believed Costco's form tracked the elements of the jury instructions, while Hirlston's proposed form was a much shorter version. Hirlston objected stating that she believed Costco's form did not track the elements because it included a reference to Costco's "good faith

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effort” damages defense. She further stated, in defense of her shorter form, that she believed the verdict form did not need to track the elements as the court had already given the jury the elements in the jury instructions. Hirlston did not lodge a specific objection to Costco’s Question 1 or the words therein.

Following this exchange, the court gave the parties a five-minute recess to agree on a verdict form. However, the parties were unable to come to an agreement and so the court formulated its own form by combining the language of both parties to track the elements. The court fully adopted the original wording of Costco’s Question 1.

II. Discussion

We review the denial of a motion for a new trial for abuse of discretion. *Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 440 (7th Cir. 2010). Under this standard, a reversal is only appropriate if “the verdict is against the weight of the evidence, the damages are excessive, or if for other reasons the trial was not fair to the moving party.” *Id.* However, even if we find there was an error at the district court, a reversal is not required if the error was harmless. *Romero v. Cincinnati Inc.*, 171 F.3d 1091, 1096 (7th Cir. 1999); Fed. R. Civ. P. 61. The specific standard of review for each of the errors Hirlston alleges is set forth below.

A. Jury Instruction 19

Hirlston alleges that the district court’s inclusion of the phrase, “she proposed” in Jury Instruction 19 was a misstatement of the law that misled the jury and affected her substantial rights. We disagree. Furthermore, we find that she is precluded from raising this argument on appeal under the invited error doctrine.

Hirlston failed to make a timely objection to the inclusion of this phrase during trial and as such, the jury instruction is only entitled

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to review for plain error. *Ammons-Lewis v. Metro. Water Reclamation Dist. of Greater Chicago*, 488 F.3d 739, 751 (7th Cir. 2007); Fed. R. Civ. P. 51. To warrant reversal under the plain error standard, there must be (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Gee*, 226 F.3d 885, 894 (7th Cir. 2000). However, because Hirlston invited the error she now complains of, not even a plain error review will permit us to reverse. *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 609 (7th Cir. 2006).

We apply the invited error doctrine when an appellant complains of an error that they “committed, invited, induced the court to make, or to which it consented.” *Weise v. United States*, 724 F.2d 587, 590 (7th Cir. 1984). We have previously applied the doctrine to the review of jury instructions when an appellant has invited error in the final instructions through its own proposed jury instructions. *United States v. Muskovsky*, 863 F.2d 1319, 1329 (7th Cir. 1988). (applying the doctrine to “prevent defendants from complaining of jury instructions which were substantially similar to the instructions they had submitted”).

Here, the portion of Jury Instruction 19 which Hirlston now challenges – ‘she proposed’ – was language introduced to the court by Hirlston herself. Thus, this phrase was only included in the final jury instructions because Hirlston suggested it to the court. Hirlston not only invited the error, but she also then consented to the error by failing to object to the inclusion of the phrase in the final instructions. The invited error doctrine prohibits Hirlston from now attacking an instruction she was a proponent of. *Williams v. Boles*, 841 F.2d 181, 184 (7th Cir. 1988).

Even if the invited error doctrine did not preclude Hirlston from challenging Jury Instruction 19, we do not find the instruction to

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contain a clear or obvious error that affects Hirlston's substantial rights. Though Hirlston claims Jury Instruction 19 ignores the interactive process between employer and employee as required by the ADA, we do not review individual jury instructions in isolation; rather we review jury instructions as a whole to determine if the law is accurately conveyed to the jury. *Ammons-Lewis*, 488 F.3d at 751.

Reviewing the instructions as a whole reveals that the interactive process was clearly and explicitly explained to the jury. For example, Instruction 20 details Costco's continuing duty to provide a reasonable accommodation, Appellee Br. 41. Furthermore, Instruction 21 states that the employer is *required to discuss with the employee* possible reasonable accommodations. *Id.* Thus when read as a whole, the instructions properly detail that Costco had a duty to accommodate Hirlston and to engage in discussions with her in search of a reasonable accommodation. Therefore, even if Jury Instruction 19 omits language about an interactive process, that idea is not absent from the instructions overall.

Finally, it is important to note that Jury Instruction 19 tracks this Court's pattern jury instructions regarding ADA claims. Specifically, Seventh Circuit Pattern Jury Instruction No. 4.05 indicates that the instruction should "describe [the] requested accommodation." In this case, the only accommodations available for the jury to contemplate were those proposed by Hirlston, as Costco did not propose any. Hirlston made this clear to the jury throughout the trial, consistently reminding them that the only accommodations were those proposed by Hirlston. The inclusion of the "she proposed" language is an appropriate description of the requested accommodations in this case and would not have led to jury confusion. Thus, none of Hirlston's arguments demonstrate how Instruction 19 was an error that "seriously affects the fairness,

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integrity, or public reputation of judicial proceedings.” *Gee*, 226 F.3d at 894.

B. Special Verdict Form

Hirlston argues that the omission of the phrase “with or without the reasonable accommodations” from Question 1 of the special verdict form was in error. According to Hirlston, this was an error because without this phrase, Question 1 does not appropriately track the elements of Jury Instruction 19. However, we disagree and further find that Hirlston is precluded from raising this argument on appeal. When an appellant properly objects to a special verdict form at trial, we review a challenge to the form on appeal for abuse of discretion. *U.S. Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 316 (7th Cir. 1988). However, when an appellant fails to properly object to a special verdict form at trial, as is the case here, they have waived the challenge on appeal. *Robinson v. Perales*, 894 F.3d 818, 827 (7th Cir. 2018); *MMG Fin. Corp. v. Midwest Amusements Park, LLC*, 630 F.3d 651, 659 (7th Cir. 2011).

Though Hirlston argues that she was not given an opportunity to object to the final version of the special verdict form, the record does not support this assertion. In fact, both parties were given ample time to read and object to both parties’ proposed forms, Appellee Suppl. App. 237-240. Included in the forms Hirlston reviewed was the *exact* wording of Question 1 which she now objects to. While Hirlston did lodge a general objection to the forms for not tracking the elements of the Court’s jury instructions, she did not object to Question 1 specifically or suggest, as she does now, that it should have included the phrase “with or without reasonable accommodation.” *Id.* at 238. Because Hirlston did not object to the special verdict forms on the grounds she now argues, she has waived the argument on appeal. *Midwest Amusements Park, LLC*, 630 F.3d at 659.

To be clear, even if Hirlston was not precluded from making this argument on appeal, we find no error with the final version of the special verdict form. Hirlston argues that the forms were confusing and misleading because they omitted the phrase “with or without reasonable accommodation.” However, as she points out in her own argument, this language was included and defined elsewhere in the district court’s jury instructions. Thus, when viewed as a whole, the jury was given the proper instructions by the district court, as the phrase “with or without reasonable accommodation” was seemingly only excluded from this one discreet aspect of the overall instructions delivered to the jury. Furthermore, the formulation of Question 1 used by the district court tracks the pattern jury instruction used by this Court, Appellee Br. 50. Our own pattern instructions also omit the phrase “with or without reasonable accommodations.” We cannot then find that the district court abused its discretion by following our lead.

C. The Evidentiary Ruling on Costco’s Two Photos

Though she herself successfully introduced photographs after discovery and court deadlines, Hirlston argues that the admission of Costco’s photographs was in error because they were produced after discovery and after the district court’s deadline for demonstrative exhibits had passed. Hirlston also argues the photos were admitted without a proper foundation. However, we find no error.

We review challenges to the district court’s evidentiary rulings for abuse of discretion. *United States v. McClurge*, 311 F.3d 866, 872 (7th Cir. 2002). Under the abuse of discretion standard, we will reverse the decision only if no reasonable person could take the position of the trial court. *United States v. Trudeau*, 812 F.3d 578, 590 (7th Cir. 2016). Even still, a remedy is available only if there is a significant chance that the error affected the outcome of the trial.

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Hasham v. California State Bd. of Equalization, 200 F.3d 1035, 1048 (7th Cir. 2000).

The district court was within its discretion to admit Costco's photos into evidence and their admission did not affect Hirlston's substantial rights. Hirlston first argues that the photos should not have been allowed as a demonstrative exhibit because they were produced after the trial court's June 4 deadline for demonstrative exhibits had passed. However, this claim is easily disproven by the record. When Hirlston raised the same claim during the trial, the court told her that the June 4 deadline was only for demonstrative exhibits to be used during opening statements, not during trial.

Hirlston further argues the district court was incorrect in finding proper foundation had been laid for the two photos. According to Hirlston, Donaldson's testimony was too equivocal to properly prove that the photos were taken in Summer 2020 or that they accurately represented the Optical Department as it was in 2015 when Hirlston was working there. While reading the transcript of Donaldson's testimony does not inspire the utmost confidence in the accuracy of his answers, the abuse of discretion standard requires much higher scrutiny than mere doubt. *McClurge*, 311 F.3d at 872. Instead, it asks whether a reasonable person could take the position of the district court after hearing Donaldson confirm the time the photos were taken and explain why the photos were an accurate representation of the Optical Department in 2015. *See Id.* Especially when considering the district court's superior ability to determine the credibility of witness testimony, we find that a reasonable person could take the same position and thus the district court did not abuse its discretion by admitting the photos over Hirlston's objections to lack of foundation. *See United States v. French*, 291 F.3d 945, 951 (7th Cir. 2002).

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Finally, Hirlston argues that because the photos were not produced during discovery, they should not have been admitted into evidence. Hirlston rightly argues that the photos should have been excluded under the district court's Oct. 13, 2020 *Orders on Motions in Limine*, granting Hirlston's motion to exclude from trial any documents that Costco failed to produce during discovery that it should have. However, Hirlston did not object to the photos on either of these grounds at trial and because "a party may not raise an issue for the first time on appeal," she has therefore waived raising this objection. *Williams v. Dieball*, 724 F.3d 957, 961 (7th Cir. 2013). Hirlston argues that because she objected to the evidence on foundational grounds at trial, she has properly preserved the issue for review. However, this is a misstatement of the law. The Federal Rules of Evidence do not allow a litigant to raise new objections on appeal that differ from those presented at the trial level. *United States v. Field*, 875 F.2d 130, 134 (7th Cir. 1989). Therefore, we find Hirlston is precluded from making this argument on appeal.

Even still, we find that the admittance of the photos into evidence did not affect the outcome of the trial or prejudice the jury against Hirlston. Hirlston argues that Costco used the two photos to demonstrate how Hirlston was unable to do her job even with her proposed accommodations. Hirlston further argues that because the jury decided each claim by determining Hirlston was unable to do her job, these photos go to the heart of the only issue decided by the jury and thus adversely affected the outcome of the trial. While it may be true that the photos and the testimony they elicited influenced the jury, that does not then establish that the jury would have found Costco's argument significantly less persuasive without them as required by the standard of review. In fact, the record suggests that the exclusion of the two photographs would not have changed the outcome of the trial.

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We find the photos to be cumulative of other properly admitted evidence. Even if the photos were *improperly* admitted (which they were not), improperly admitted evidence that is merely cumulative of properly admitted evidence is generally seen as harmless. *Jordan v. Binns*, 712 F.3d 1123, 1138 (7th Cir. 2013). During the trial, the jury heard detailed testimony from several employees describing the layout of the Optical Department as depicted in the two photos, Appellee Br. 61. The jury also saw a demonstrative of the Department's layout which provided a visual depiction of the size and placement of the cubicles in the photos. *Id.* at 62. Thus, any information provided by the photos was also provided in several other testimonies and exhibits, rendering its individual effect on the trial null.

Furthermore, the two photos were used to demonstrate Hirlston's inability to complete only *one* of her job functions with an accommodation. The rest of the trial included ample testimony and evidence regarding Hirlston's inability to complete many of her other job duties with various other proposed accommodations. When the jury determined that Hirlston was not able to perform her job, they were considering all of Hirlston's job functions and proposed accommodations, not just the job functions involving the grabber. This further shrinks the possibility that the two photos had a significant chance of affecting the outcome of the trial, as the jury still would have very likely found Hirlston unable to perform several other essential job functions regardless of the photos' admission. Thus, even if Hirlston had properly preserved this argument for appeal, the admittance of the photos did not affect her substantial rights or the outcome of the trial.

D. The District Court's Ruling on Hirlston's Retaliation Claim

Hirlston's appeal on her retaliation claim is predicated on her other three arguments succeeding. Thus, because we find that there

13 No. 22-2067
were no tainted jury instructions, verdict forms, or improperly
admitted evidence, then Hirlston's argument that the retaliation
claim was tainted automatically fails as well.

III. Conclusion

This Court affirms the district court's denial of Hirlston's motion for a new trial. The Court further affirms the jury verdict on Hirlston's discrimination claim and the district court's verdict on Hirlston's retaliation claim as Hirlston has failed to demonstrate that any of the district court's decisions she now appeals were in error.

AFFIRMED.

Applicant Details

First Name **Sara Alisa**
 Last Name **Hoban**
 Citizenship Status **U. S. Citizen**
 Email Address alisah@stanford.edu
 Address

Address
Street 10800 Ariock Lane City Austin State/Territory Texas Zip 78739 Country United States

Contact Phone Number **5126531445**

Applicant Education

BA/BS From **Brown University**
 Date of BA/BS **May 2019**
 JD/LLB From **Stanford University Law School**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011
 Date of JD/LLB **June 10, 2024**
 Class Rank **School does not rank**
 Does the law school have a Law Review/Journal? **Yes**
 Law Review/Journal **No**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Marion Rice Kirkwood Memorial Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Sklansky, David
dsklansky@law.stanford.edu
650-497-6580
Letter, Dean's
deansletter@law.stanford.edu
650-723-4455
Weisberg, Robert
weisberg@law.stanford.edu
Romano, Michael
mromano@stanford.edu
(650) 736-8670

This applicant has certified that all data entered in this profile and any application documents are true and correct.

S. ALISA HOBAN

1645 Madrono Ave., Palo Alto, CA 94306 | (512) 653-1445 | alisah@stanford.edu

June 12, 2023

The Honorable Jamar Walker
United States District Court
for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker,

I am a rising third-year student at Stanford Law School and write to apply to serve as your law clerk in 2024-2025. I am the first in my family to attend law school, and I came to Stanford Law to pursue a career as a public defender. I have continued to pursue that goal throughout law school but have also gained an interest in protecting the rights of individuals and families through complex litigation. Your mentorship would be invaluable to me given your own career path in criminal law as an AUSA. I would be especially excited to learn your perspective on how judges navigate difficult legal issues while maintaining a fair, even handed approach to the law.

Throughout law school, working directly with clients has shown me firsthand the importance of careful application of the law—an importance matched only by the need to treat vulnerable individuals with dignity and respect. For example, in Stanford’s Community Law Clinic, I further developed my passion for legal research and advocacy by representing clients in unlawful detainer suits and social security administration hearings. Equally meaningful has been my participation in Stanford’s Three Strikes Project, through which I drafted a habeas petition on behalf of a client serving a 25-to-life sentence. These experiences cemented my belief in the power of combining detail-oriented legal research with centering the humanity of every individual pursuing their day in court. It would be an honor to work in your chambers, particularly given your dedication to upholding the rights and dignity of all.

Enclosed please find my resume, references, law school transcript, and writing sample for your review. Professor David Sklansky, Professor Robert Weisberg, and Professor Michael Romano are providing letters of recommendation in support of my application.

I welcome the opportunity to discuss my qualifications further. Thank you for your consideration.

Sincerely,

Alisa Hoban

S. ALISA HOBAN

10800 Ariock Lane, Austin, TX 78739 | alisah@stanford.edu | 512-653-1445

EDUCATION

Stanford Law School, Stanford, CA Juris Doctor, expected June 2024

Honors: Leon M. Cain Community Service Award (awarded for strengthening the community through leadership and care); John Hart Ely Prize for Outstanding Performance in Lawyering for Change

Activities: Kirkwood Moot Court (participant); Fresh Lifelines for Youth (volunteer); Stanford Law Association (Vice President of Academic Affairs); Stanford Latinx Law Student Association (Vice President, Community Development); Women of Color Collective (member)

Publications: *The Value of Relentless Efforts to Organize for Abolition in the South*, student note selected for publication by the Stanford Journal for Civil Rights and Civil Liberties in 2024

Brown University, Providence, RI Bachelor of Arts in Political Science, May 2019

Honors: International Honors Program (Human Rights, Nepal, Jordan, and Chile, Spring 2018)

Activities: Brown Dining Services (Employee); Swearer Center for Student Engagement Committee (Member); ESOL Childcare (Volunteer); Algebra in Motion (Volunteer)

EXPERIENCE

Public Defender Service for the District of Columbia *Summer Law Clerk*, June – Aug. 2023

- Represent youth in disciplinary hearings, draft pleadings for court reviews, and assist with legal research.

Stanford Community Law Clinic *Clinical Student*, Jan. 2023 – Present

- Served as co-representative for clients under supervision of Mills Legal Clinic attorneys.
- Conducted direct examination of client and closing arguments during administrative hearing to obtain social security benefits; researched affirmative defenses, filed answers, and negotiated settlement agreement with opposing counsel in unlawful detainer suits; performed legal research on post-conviction relief statutes.

Professor Lawrence Marshall, Stanford Law School *Research Assistant*, Aug. 2022 – Dec. 2022

- Conducted legal research for Professor Lawrence Marshall, co-founder and former legal director of the Center on Wrongful Convictions, on the successful movement to abolish the death penalty in Illinois

Federal Defenders, Eastern District of New York, *Legal Intern*, June – Aug. 2022

- Prepared motion for early termination of supervised release. Drafted deferred prosecution memorandum. Assisted in preparing cross examination, witness lists, and reviewed discovery for violation of supervised release hearing. Prepared legal research and initial drafts of motions *in limine*.
- Attended arraignments, sentencing hearings, bail hearings, and pleas.
- Conducted long-term legal research projects related to the legislative history of certain statutes.

U.S. Department of Justice, Antitrust Division *Paralegal Specialist, Criminal Section*, Aug. 2019 – June 2021

- Supported trial attorneys by assisting in investigations, performing legal research, and maintaining document databases. Prepared memoranda on proffers, plea negotiations, and subpoena compliance.

Washington Legal Clinic for the Homeless *Volunteer*, Sept. 2019 – June 2021

- Conducted client intake interviews at shelter sites in Washington, D.C. Provided clients with resource guides and referrals to relevant organizations.

Brown Refugee Youth Tutoring and Enrichment (BRYTE) *Director, Tutor*, Jan. 2016 – June 2019

- Co-directed Brown's largest volunteer organization of 167 members. Held meetings with advisors, coordinated trainings, organized outreach and recruitment, and managed community events.

Refugee and Immigrant Center for Education and Legal Services *Legal Intern*, June – Aug. 2018

- Assisted attorneys in completing immigration relief materials including asylum claim applications, special immigrant juvenile status visas, and residency applications. Researched country conditions for asylum claims; accompanied clients to immigration appointments.

LANGUAGE

Spanish (professional proficiency)

S. ALISA HOBAN

10800 Ariock Lane, Austin, TX 78739 | alisah@stanford.edu | 512-653-1445

RECOMMENDERS

Professor Robert Weisberg
Stanford Law School
(650) 723-0612
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Professor David Sklansky
Stanford Law School
650-497-6580
sklansky@stanford.edu

Professor Michael Romano
Stanford Law School
mromano@stanford.edu
650-736-8670

REFERENCES

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718-330-1206

Juliet Brodie
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jmbrodie@law.stanford.edu
650-724-2507

Lauren Zack
Stanford Community Law Clinic, Supervising Attorney
lzack@law.stanford.edu
650-725-0927

Law Unofficial Transcript

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Name : Hoban, Alisa
Student ID : 06485059

Print Date: 05/22/2023

----- Academic Program -----

Program : Law JD
09/20/2021 : Law (JD)
Plan
Status Active in Program

----- Beginning of Academic Record -----

2021-2022 Autumn

Course	Title	Attempted	Earned	Grade	Equiv
LAW 201	CIVIL PROCEDURE I	5.00	5.00	P	
Instructor:	Sinnar, Shirin A				
LAW 205	CONTRACTS	5.00	5.00	P	
Instructor:	Kelman, Mark G				
LAW 219	LEGAL RESEARCH AND WRITING	2.00	2.00	H	
Instructor:	Mance, Anna				
LAW 223	TORTS	5.00	5.00	P	
Instructor:	Engstrom, Nora Freeman				
LAW 240U	DISCUSSION (1L): RACE, CIVIL RIGHTS, AND HUMAN RIGHTS	1.00	1.00	MP	
Instructor:	Martinez, Jennifer				
LAW TERM UNITS:	18.00	LAW CUM UNITS:	18.00		

2021-2022 Winter

Course	Title	Attempted	Earned	Grade	Equiv
LAW 203	CONSTITUTIONAL LAW	3.00	3.00	P	
Instructor:	Martinez, Jennifer				
LAW 207	CRIMINAL LAW	4.00	4.00	P	
Instructor:	Weisberg, Robert				
LAW 224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	P	
Instructor:	Wall, Robin Michael				
LAW 3507	LAW AND THE RHETORICAL TRADITION	3.00	3.00	P	
Instructor:	Sassoubre, Ticien Marie				
LAW TERM UNITS:	12.00	LAW CUM UNITS:	30.00		

2021-2022 Spring

Course	Title	Attempted	Earned	Grade	Equiv
LAW 217	PROPERTY	4.00	4.00	P	
Instructor:	Thompson Jr, Barton H				
LAW 224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	H	
Instructor:	Wall, Robin Michael				
LAW 2402	EVIDENCE	4.00	4.00	P	
Instructor:	Sklansky, David A				
LAW 7111	LAWYERING FOR CHANGE: A CASE STUDY IN EFFORTS TO ABOLISH THE DEATH PENALTY	2.00	2.00	H	
Instructor:	Marshall, Lawrence				
Transcript Note:	John Hart Ely Prize for Outstanding Performance				
LAW 7833	SPANISH FOR LAWYERS	2.00	2.00	MP	
Instructor:	Calderon, Adriana L				
	Sundaresan, Milan				
LAW TERM UNITS:	14.00	LAW CUM UNITS:	44.00		

2022-2023 Autumn

Course	Title	Attempted	Earned	Grade	Equiv
LAW 400	DIRECTED RESEARCH	2.00	2.00	H	
Instructor:	Sklansky, David A				
LAW 2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	H	
Instructor:	Weisberg, Robert				
LAW 2008	THREE STRIKES PROJECT: CRIMINAL JUSTICE REFORM & INDIVIDUAL REPRESENTATION	3.00	3.00	H	
Instructor:	Romano, Michael S				
LAW 7820	MOOT COURT	2.00	2.00	MP	
Instructor:	Fenner, Randee J				
	Pearson, Lisa M				

Information must be kept confidential and must not be disclosed to other parties without written consent of the student.

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Law Unofficial Transcript

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Name : Hoban, Alisa
Student ID : 06485059

LAW TERM UNITS: 11.00 LAW CUM UNITS: 55.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Equiv
LAW	902A	COMMUNITY LAW CLINIC: CLINICAL PRACTICE	4.00	4.00	P	
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	902B	COMMUNITY LAW CLINIC: CLINICAL METHODS	4.00	4.00	H	
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	902C	COMMUNITY LAW CLINIC: CLINICAL COURSEWORK	4.00	4.00	H	
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	7820	MOOT COURT	1.00	1.00	MP	
Instructor:		Fenner, Randee J Pearson, Lisa M				

LAW TERM UNITS: 13.00 LAW CUM UNITS: 68.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Equiv
LAW	902	ADVANCED COMMUNITY LAW CLINIC	3.00	0.00		
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	2001	CRIMINAL PROCEDURE: ADJUDICATION	4.00	0.00		
Instructor:		Weisberg, Robert				
LAW	7010B	CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT	3.00	0.00		
Instructor:		Schacter, Jane				
LAW	7826	ORAL ARGUMENT WORKSHOP	2.00	0.00		
Instructor:		Fenner, Randee J				

LAW TERM UNITS: 0.00 LAW CUM UNITS: 68.00

END OF TRANSCRIPT

Information must be kept confidential and must not be disclosed to other parties without written consent of the student.

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

BROWN UNIVERSITY
Providence, Rhode Island 02912
OFFICIAL ACADEMIC TRANSCRIPT
401-863-2500

Name: Hoban , Sara Alisa
Student Number: B01171023

Record Date: 10/04/19
Page 1 of 1

Code	Course Number	Course Title	Grade	Code	Course Number	Course Title	Grade
Fall 2015: Admitted as a Degree Candidate The College				Fall 2018: Returned From Exchange Program or Leave to Study Abroad			
Undergraduate Fall 2015				Undergraduate Fall 2018			
PHIL	1600	Philosophy of Law	A	HISP	0500	Advanced Spanish I	B
PLCY	0100	Introduction to Public Policy	B	HISP	0750R	Mexico: Intro to Its Hist&Cult	A
POLS	1010	Tpcs:American Constitutnal Law	B	HIST	1947A	1968 Latin America/Worldwide	A
VISA	0100	Studio Foundation	A	URBN	1870M	Urban Regimes in Amer Republic	A
Undergraduate Spring 2016				Undergraduate Spring 2019			
APMA	0650	Essential Statistics	A	HISP	0600	Advanced Spanish II	B
ECON	0110	Principles of Economics	A	POLS	1821N	Political Journalism	A
EDUC	0410E	Empowering Youth	A	POLS	2150	Democrato Thry,Justice,the Law	A
POLS	0110	Intro to Political Thought	B	SOC	1281	Migration in the Americas	A
Undergraduate Fall 2016				Degree Awarded			
ECON	1110	Intermediate Microeconomics	A	Bachelor of Arts			
HISP	0300	Intermediate Spanish I	S	May 26, 2019			
HIST	0244	Middle East:1800s to Present	B	AB - Political Science			
POLS	0010	Intro:Amer Political Process	B	(American)			
Undergraduate Spring 2017				END OF TRANSCRIPT			
EDUC	1110	Intro Stat-Rsrch/Pol Analysis	A				
HISP	0400	Intermediate Spanish II	S				
PLCY	1701W	Race and Public Policy	A				
POLS	18240	Democracy	B				
Undergraduate Fall 2017							
POLS	1821I	Issues in Democratic Theory	A				
POLS	1822I	Geopolitics of Oil and Energy	A				
POLS	1822W	Congressional Investigations	B				
POLS	1970	Individual Reading and Research	S				
Spring 2018: Leave of Absence to Study Abroad							
For Work Completed At SIT Graduate Inst (1/18-6/18)							
SAB	CRSE	Comp Issues Human Rights	S				
SAB	CRSE	Field Ethics & Comp Resear	S				
SAB	CRSE	Fndtn & Frmwrk Hum Rights	S				
SAB	CRSE	Grassroots Mvmnts & NGO's	S				

SARA ALISA HOBAN



Robert F. Fitzgerald

Robert F. Fitzgerald
University Registrar

David Alan Sklansky
Stanley Morrison Professor of Law
Faculty Co-Director, Stanford Criminal Justice Center
559 Nathan Abbott Way
Stanford, California 94305-8610
650-497-6580
dsklansky@law.stanford.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing in enthusiastic support of the application of my student, Alisa Hoban, Stanford Law JD24, to clerk for you. Alisa is a wonderful student, a spectacular human being, and a joy to be around. She has compiled an impressive academic record at Stanford while throwing herself into a dizzying array of extracurricular activities, leadership responsibilities, and pro bono work. She has a deep, passionate commitment to public service, but is not in the least headstrong or self-righteous. She knows what she thinks, and can argue for it cogently, but is soft-spoken, open-minded, and genuinely interested in learning from others. She is disciplined and diligent when working independently, but also enjoys—and is good at—collaboration. She is an accomplished writer and is good at taking and incorporating suggestions. She will be an exemplary law clerk.

I know Alisa well. She took my Evidence course in the spring of her first year of law school, and the following fall she wrote a paper under my supervision. She did fine in Evidence, but her work on the paper is what really impressed me. She took on a hard and important question: in how many cases, and what kinds of cases, have the new legislative restrictions on the felony murder rule in California made a difference? Answering the question took a combination of close doctrinal analysis, careful parsing of statutory language, and some diligent and creative empirical work, reaching out to and interviewing a range of prosecutors and defense attorneys. The final result was a very impressive paper, easily earning an honors grade.

Stanford Law School attracts many impressive students with strong commitments to public service, but Alisa is exceptional in this regard, even compared with her classmates. As an undergraduate at Brown—where she earned a bachelor's degree in political science and participated in the International Honors Program—she participated in a range of service activities targeting underprivileged youth, including as an algebra tutor, a childcare volunteer, a member of the Student Engagement Committee for Brown's Swearer Center for Public Service, and a co-director of Brown Refugee Youth Tutoring and Enrichment. She also spent a summer interning at the Refugee and Immigrant Center for Education and Legal Services. Between college and law school, Alisa worked as a paralegal at the Antitrust Division of the U.S. Department of Justice, while also volunteering at the Washington Legal Clinic for the Homeless and at an organization providing childcare at a shelter for survivors of domestic violence. Here at Stanford, Alisa has participated in the law school's Three Strikes Project and its Fresh Lifelines for Youth program, and she has helped to lead the Stanford Law Association, the Stanford Latinx Law Student Association, the Criminal Law Society, and the Women of Color Collective. In recognition of her truly extraordinary service, she received the Leon M. Cain Community Service Award following her first year of law school. Alisa spent the summer after her 1L year interning with the Federal Defenders Office in Brooklyn, and she will work during her 2L summer in the Juvenile Services Program at the Public Defender Service in Washington, D.C.

Alisa is a truly extraordinary student. She will be a wonderful law clerk. Please don't hesitate to let me know if I can answer any questions about her.

Sincerely,

/s/ David Alan Sklansky

David Sklansky - dsklansky@law.stanford.edu - 650-497-6580

JENNY S. MARTINEZRichard E. Lang Professor of Law
and DeanCrown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723-4455
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jmartinez@law.stanford.edu

Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes “Pass” (P) as the default grade for typically strong work in which the student has mastered the subject, and “Honors” (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

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The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

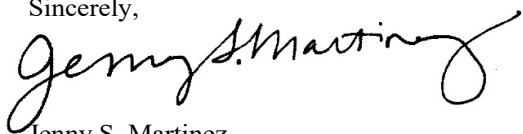
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

Robert Weisberg
Edwin E. Huddleson, Jr. Professor of Law
Faculty Co-Director, Stanford Criminal Justice Center
Associate Dean for Curriculum
559 Nathan Abbott Way
Stanford, California 94305-8610
650-723-0612
weisberg@stanford.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

With her great intellectual energy, her passion and commitment to constitutional values, her first-class legal reasoning and analytic skills, and her wonderful personality, Sara Alisa Hoban (she goes by Alisa), Stanford J.D. 2024, is among my favorite law students over many years. I know Alisa exceptionally well. She was in my section for first-year Criminal Law, a required course. She then chose to rule in both of my criminal procedure electives. In the fall of 2022, she was in the course in Criminal Investigation, the challenging adventure through Supreme Court doctrines on searches and seizures and interrogations. She then completed the spring elective in Criminal Adjudication, which covers a wide variety of topics ranging from right to counsel to ineffective assistance of counsel to plea bargaining to jury selection to double jeopardy and even a dash of federal habeas corpus. In all, Alisa has been a terrific student. In class discussions, she regularly offered very sharp and insightful responses. Indeed, she is happy to play the role of the perfect Socratic dialogue partner. In the first-year course, she really wrote an excellent exam, but under our extremely opaque grading system, she was a statistically insignificant point from the Honors range (her paper might have gotten an A-minus on our old system). Fortunately, she got over the hurdle by far in the Investigation course. (The spring exams haven't been graded yet, but I expect her to do at least as well in Adjudication.) And I'll be so bold as to say this is telling for the following reason: This is not a compliment to me, but I am notorious at Stanford Law School for giving very difficult, time-pressured, issue-spotter exams. True, a very strong student could have an unlucky bad day on my exams, but a merely fair student cannot have a lucky Honors level performance.

So, I believe that in combination with her other courses, Alisa has demonstrated absolutely top-notch talent along the dimensions you seek in your clerkship. Indeed, in that regard, I'm happy to note that she has scored Honors grades in two terms of our extremely rigorous Legal Research and Writing curriculum (the second term is called Federal Litigation). Those are real gauntlets that test the ability to do the kind of analytic writing you expect of your clerks.

But let me add some thoughts about Alisa's background. She's a Texan whose ancestry comes from migrant workers at the Rio Grande border. She has a very acute sense of social justice and injustice, and her civil rights idealism is deep and passionate, but Alisa is no ideologue. She is a very practical-minded young lawyer who does all the hard work of thinking through doctrinal arguments on both sides of whatever position she might favor. Notably, in her two years between college and law school, she both volunteered for a project providing legal aid to the homeless and worked full-time as a paralegal in the DOJ Antitrust Division.

I'm pleased to see that she is also highly regarded by some of my most distinguished colleagues. Professor Larry Marshall, one of the leading death penalty lawyers in the nation, has supervised her paper on the history of the abolition movement in the southern states. Another colleague, Professor David Sklansky, has supervised her research on changes in California's felony murder law—a topic that requires extremely detailed and nuanced statutory analysis. Alisa has also walked the walk in our famed Three Strikes Project, helping incarcerated clients navigate the intricacies of state habeas law by drafting petitions that benefit from new sentencing reduction laws. Meanwhile, she's been a wonderfully active civic leader here at Stanford, including, and here I'm being selfish, as a leader of the Criminal Law Society, the student group which works directly with the Stanford Criminal Justice Center, which I co-direct.

Finally, I want to note something that might get lost on her résumé. Alisa was selected by her classmates to be on the Academic Affairs Committee of the Stanford Law Association. One of the functions of that committee is to represent students as part of a small group that interviews candidates for faculty positions.

At Stanford, whenever we consider an entry-level assistant professor candidate or a lateral tenured professor candidate, in addition to our faculty interviewing process, the candidates always meet with this committee. And our Appointments Committee (and, if the case goes forward, the whole faculty) will rely significantly on the students' views on what kind of teacher and role model the candidate might be for students. So, Alisa's placement on that committee demonstrates the academic sophistication and judgment her classmates ascribe to her.

Finally, Alisa is an incredibly generous, warm, and collegial person. She'll bring these character traits and her great legal talent to your chambers. If I can supply further information about Alisa, please let me know. Indeed, feel free to call me at your convenience via my cell phone: (650) 888-2648.

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Sincerely,
/s/ Robert Weisberg

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